31-258

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 173.

LYDIA BACON, DAVID BACON, FRANCIS M. IVES, AND JOHN A. MONTAGUE, PLAINTIFFS IN ERROR,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 21, 1885.

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1 UNITED STATES OF AMERICA.

STATE OF MICHIGAN, *Western District of Michigan*, ss:

The Circuit Court of the United — for the Western District of Michigan, Southern Division.

The Northwestern Mutual Life Insurance Company, who is a citizen of the State of Wisconsin, plaintiff herein, by Champlin & More, its attorneys, comes and files its declaration as commencement of —, and complains of Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives, who are citizens of the State of Michigan, defendants herein, in a plea of ejectment, filing this declaration, entering rule to plead, etc., as commencement of suit.

For that whereas the said plaintiff, on the 15th day of June, in the year one thousand eight hundred and eighty-one, was possessed of the following real estate and premises, situate in the city of Niles, county of Berrien, in the said western district of Michigan, and being known and designated as lot number twenty-seven (27), in William Justice's Addition to Niles, as designated in the recorded plat thereof, recorded in Book C, page 627; which p-emises theplaintiff claims in fee;

2 and, the said plaintiff being so possessed thereof, the said defendant afterwards, to wit, on the 16th day of June, in said last-mentioned year, entered into said premises and unlawfully with-eld from said plaintiff the possession thereof, to the damage of said plaintiff one thousand dollars, and therefore it brings suit, etc.

CHAMPLIN & MORE,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, } ss:

I hereby certify and return that on the twenty-fourth day of June, A. D. 1881, I served a copy of the within declaration upon David Bacon, Lydia Bacon, Francis M. Ives, and John A. Montague, the defendants named therein, at Niles, in said district, by delivering to each of them personally a copy thereof, with the notice of rule to plead endorsed thereon, as hereon endorsed.

Fees, $16.00.

JAMES MONROE,
U. S. Marshall.

I, Wm. H. Ramsay, acknowledge myself security for all costs for which the plaintiff may be liable in this suit.

WM. H. RAMSAY.

3 *Narr.*

Circuit Court of the United States for the Western District of Michigan, Southern Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
LYDIA A. BACON *et al.* } No. 1666.

To the within-named defendants:

Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit, a rule was entered in the book of common rules, kept by the clerk of said court in his office, in the city of Grand Rapids, said district, requiring — to appear and plead to said declaration within twenty days after service on you of a copy thereof and notice of said rule, or judgment, etc.

Yours, etc., CHAMPLIN & MORE,
Plaintiff's Attorneys.

June 23rd, A. D. 1881.

Filed June 23rd, 1881.

HENRY M. HINSDELL, *Clerk.*

4 Circuit Court of the United States, Western District of Michigan, Southern Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
LYDIA A. BACON, DAVID A. BACON, JOHN A. MONTAGUE, and FRANCIS M. IVES.

JUNE 23, 1881.

In this cause, on filing declaration as commencement of suit, pursuant to the statute in such case made and provided, and on motion of Champlin and More, attorneys for plaintiff, ordered that said defendants appear and plead to said declaration within twenty days after service on them of a copy thereof, together with notice of this rule, or judgment, &c.

CHAMPLIN & MORE,
Attorneys for Plaintiff.

5 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan.

THE NORTH AMERICAN LIFE INSURANCE COMPANY
vs.
LYDIA A. BACON, DAVID BACON, FRANCIS M. IVES, and JOHN A. MONTAGUE.

Now comes the said defendants, Lydia A. Bacon, David Bacon, Francis M. Ives, and John A. Montague, by Edward Bacon, their attorney, and demand a trial of the matters set forth in the plaintiff's declaration.

EDWARD BACON,
Attorney for said Def'ts.

To the above-named plaintiff and to Champlin and More, attornies:

GENTLEMEN: Please take notice that on the trial of this cause the defendants, Lydia A. Bacon, under her said plea of the general issue, will give in evidence and insist that within three years next prior to April 10th, 1881, she, in good faith and for a valuable consideration, purchased from Solyman Waterman, heretofore of Niles, in said district, and lately of San Francisco, in the State of California,
6 all of lot number fifty-seven (57) in that part of the village (now city) of Niles, in said district, which was laid out by William Justice; that under her said purchase she legally entered into peac-able possession of said lot, and received from said Waterman a good and sufficient conveyance thereof to said Lydia A. Bacon, her heirs and assigns, in fee simple, and that under such conveyance, and in good faith, she has by her agents and tenents peac-ably and exclusively occupied said lot under color of title and in good faith for a long space of time, to wit, two years and six months last past, and that said Solyman Waterman, at the time of this defendant's said purchase and conveyance, under the laws of the land and the statu-e of the State of Michigan as then construed by the supreme court of the State of Michigan, was the owner of fee simple of said lot, as the defendant then beleived and still doth beleive, and that prior to this defendant's said purchase said Waterman had for a number of years been in peac-able and exclusive possession of said lot, and that said Solyman Waterman and those through whom he claimed title, and who also for a long space of time, to wit, six
7 years, had been in peac-able and exclusive possession of said lot prior to said possession by said Waterman, did on said lot make valuable buildings and improvements, to wit, a hotel building and out-houses of great value, to wit, of the value of three thousand dollars: a barn of great value, to wit, of the value of fifteen hundred dollars, and other improvements, including fences, well, and cistern, of great value, to wit, of the value of one thousand dollars, and that by means of such building- and improvements the value of said premises was increased to a great extent, to wit, to the extent of fifty-five hundred dollars, and so remained increased in value until a certain year, to wit, 1868, wherein one Edgar Reading, under whom said plaintiff pretends to have derived its claim, did, illegally and without the consent of said Solyman Waterman, entirely or for the greater part remove said buildings and improvements or destroy the same, and did, illegally and without the consent of said Solyman Waterman or this defendants, make on said premises other buildings and improvements of great value, to wit, of the value of five thousand dollars, whereby the value of said premises has hitherto remained increased to a great extent, to wit, the extent of fifty-five hundred dollars.

8 Take furthur notice that on the trial of this cause under the said plea *of* the said defendant, Lydia A. Bacon will, under act number 188 of the session laws of Michigan for 1873, and under act number 180 of the session laws of Michigan, for 1875, and other statu-es in such case made and provided, insist and claim that

if in this suit the said plaintiff shall recover, then that this defendant shall be allowed compensation for buildings and improvements on said lot, erected or made by her or any person through whom she claims title, to the extent that such buildings increased the value of said lot and to a great extent, to wit, to the extent of fifty-five hundred dollars.

Take furthur notice that under the said plea all the said defendants will give in evidence and insist on the trial of this cause that heretofore, to wit, in the year 1868, said Solyman Waterman being the owner of said lot and said Edgar Reading being wrongfully in possession of said lot and illegally claiming title in fee, thereto wrongfully denying the right and title of said Solyman Waterman, said Solyman Waterman did, in the circuit
9 court for the county of Berrien, commence an action of ejectment against said Edgar Reading in said year, — being duly served with a copy of the declaration and notice of the will to plead in said action of ejectment, did appear in said action and duly plead the general issue there, in that said action there has been on trial by jury, and said Waterman recovered judgment in the usual form for possession of said lot; but a new trial was granted in said action, and said action remains still pending in said circuit court for the county of Berrien.

Also, furthur, that if on the trial of this cause it shall appear that the defendants, David Bacon, Frances M. Ives, John A. Montague, or either of them, was in possession of said lot or of any part thereof, such possession was, under right, derived from said Lydia A. Bacon.

Take furthur notice that on said trial under said plea said defendant, Lydia A. Bacon, will give in evidence and insist, at the time she so as aforesaid purchased said lot, entered into possession thereof, received her conveyance, and paid the consideration for said
10 lot, and throughout the time she continued in *in* possession, the pretended foreclosure, by advertisement prior to 1855, as to the mortgage by said Solyman Waterman to Anna H. Dickson, under which said plaintiff claims title, was null and void according to the decision of the supreme court of Michigan concerning the statu-es of the State of Michigan in such case made and provided, to wit, chapter 130 of the revised statu-es of Michigan for 1846, and especially sections 3 and 4 of said chapter, and that under said statu-es, so construed, the rights of this defendant became vested rights, and that she ought not to be deprived of any of her said rights, nor should such rights be lessened or impaired by any new and contrary construction given to any of said statu-es by any subsequent decision of said supreme court of Michigan in 1881, in effect overruling decisions construing said statu-es and under which this defendant's rights were acquired and vested, and the possession continued in full reliance on such existing decisions,

Also, furthur, from a certain time, to wit, March 15th, 1854, until said Lydia A. Bacon so as aforesaid entered into possession of said lot, those persons through whom said plaintiff derives its pre-
11 tended title were in possession of said lot, receiving all the rents and profits thereof, being of great annual value, to wit, of

the value of one thousand dollars every year, by means whereof and otherwise the aforesaid mortgage and the debt alleged to have been secured thereby was paid and extinguished and ought to be cancelled; and the said defendant, Lydia A. Bacon, pursuant to the statu-e in such case made and provided, requests the jury, or if the case be tried without a jury then the court shall, on the trial of this cause, find, in case of recovery by the plaintiff, whether the said lot has been actually and peac-fully occupied by the said defendants or the persons through whom she claims title, and the time of such occupation, and shall determine the increased value of said lot by reason thereof.

EDWARD BACON,
Attorney for Defendants.

[Endorsed:] United States of America. The circuit court of the United States for sixth circuit and western district of Michigan. No. 1666. The North American Life Insurance Company *vs.* Lydia A. Bacon, David Bacon, Francis M. Ives, and John A. Montague. Plea and notice. Filed July 8th, 1881. Henry M. Hinsdell, clerk. Edward Bacon, att'y for plaintiff.

12 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
LYDIA A. BACON, DAVID BACON, JOHN A. MONTAGUE, and FRANCIS M. IVES.

In this cause the parties, by their respective attornies, waive all right to any trial by jury herein and consent that — cause be tried by the court without any jury.

Dated March 7th, A. D. 1882.

CHAMPLIN & MOORE,
Att'ys for Pl'ff.
EDWARD BACON,
Attorney for Defendants.

[Endorsed:] No. 1666. United States of America. In the circuit court of the United States for the sixth circuit and western district of Michigan. The Northwestern Mutual Life Insurance Company *vs.* Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives. Stipulation for trial without any jury. Filed March 7th, 1882. Henry M. Hinsdell, clerk. Edward Bacon, attorney for defendants.

13 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

The President of the United States of America to Daniel Sheehan and Lewis Hoyt:

You are hereby commanded that, laying aside all and singular your business and excuses, you be and appear in the circuit court of the United States for the sixth circuit and western district of Michigan, at the United States court-rooms, in the city of Grand Rapids, in said district, on Friday, the 25th day of May, A. D. 1883, at ten o'clock a. m. of said day, then and there to testify and give evidence in a case to be tried, wherein The Northwestern Mutual Life Insurance Company is plaintiff and Lydia A. Bacon, John A. Montague, and Francis M. Ives are defendants, on behalf of said plaintiff.

Hereof fail not under the penalty of what may befall you thereon.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said court, at Grand Rapids, this 23 day of May, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and seventh.

[SEAL.] HENRY M. HINSDELL, *Clerk*,
By JOHN McQUIWAN, *Deputy*.

13½ [Endorsed:] No. 1666. Circuit court of the United States, western district of Michigan, southern division. The Northwestern Mutual Life Ins. Co. *vs.* Lydia A. Bacon *et al.* Subpœna. Filed May 25th, A. D. 1883. H. M. Hinsdell, clerk.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the 23rd day of May, A. D. 1883, I served the within writ upon the within-named Daniel Sheehan and Lewis Hoyt by reading to each one of them said writ and by showing the seal of the court impressed thereon.

Travel, 100 miles	$6 00
Service, 2	1 00
Fees, 2	22 20

JAMES MONROE,
U. S. Marshal,
By R. WILLIAMS, *Deputy*.

14 *Orders.*

THE UNITED STATES OF AMERICA, }
Western District of Michigan, Southern Division, } *ss:*

U. S. Court.

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city

of Grand Rapids on the 25th day of May, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and seventh—present, the Honorable Solomon L. Withey, district judge—among the proceedings then and there had were the following, to wit:

THE NORTHWESTERN MUTUAL LIFE INSURANCE CO.
vs.
LYDIA BACON, DAVID BACON, JOHN A. MONTAGUE, and FRANCIS M. IVES. } No. 1666.

This cause came on for trial before the court without a jury, J. W. Champlin, Esq., appearing for the plaintiff and Edward Bacon for defendant, and after hearing the evidence and the arguments of said counsel the court took the same into consideration.

15 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern *District*.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
DAVID BACON, LYDIA A. BACON, FRANCIS M. IVES, and JOHN A. MONTAGUE.

In this cause it is hereby stipulated by and between the parties, by their respective attorneys, that the facts hereinafter stated *and* admitted to be true, and may be read in evidence on any trial of this cause without other or further evidence thereof, namely:

1st. That on the 8th day of May, A. D. 1849, Solyman Waterman was the owner in fee of lot twenty-seven (27) of William Justice's plat of the village of Niles, laid out by William Justice, and are the same premises described in plaintiff's declaration in the cause.

2nd. That on the said 8th day of May, A. D. 1849, the said Waterman executed and delivered to Anna H. Dickson a
16 mortgage upon said premises to secure the payment to her of fourteen hundred dollars and interest, it being a purchase-money mortgage, which mortgage was recorded in the office of the register of deeds for the *court* of Berrien on the eleventh day of May, A. D. 1849, in Liber E of Mortgages, at pages 51 & 52; that said mortgage contained the usual power of sale in case of default of the payment of principal at the times and manner therein specified.

3rd. That on and before the 18th day of December, A. D. 1852, default had been made by said Solyman Waterman in the payment of money due upon said mortgage, and that on said 18th day of December, 1852, there was due and unpaid on said mortgage the sum of six hundred and sixty-four dollars and fifty cents, and that proceedings at law had been instituted to recover every part of said debt.

4th. That on the 18th day of December, A. D. 1852, the said Anna H. Dickson took proceedings to foreclose said mortgage, under and

by virtue of the power of sale therein contained, by advertisement, and on that day inserted in the Niles Republican, a newspaper printed, published, and circulated in said county of Berrien, a notice of mortgage sale as follows:

17 *Mortgage Sale.*

"Default having been made in the payment of a sum secured by mortgage by Solyman Waterman to Anna H. Dickson, both of Niles, in the State of Michigan, dated the eighth day of May, 1848, and recorded in Book E of Mortgages, in the office of the register of deeds of Berrien county in said State, on the eleventh day of May, 1849, and two and one-fourth o'clock in the afternoon, in pages fifty-one and fifty-two, the premises described in said mortgage being lot number twenty-seven, in that part of the village, in said county, laid out by William Justice, pursuant to a power of sale contained in said mortgage, and no suit or proceedings having been instituted at law to recover any part of the debt secured by said mortgage, the premises in said mortgage described will be sold at the court-house door, in Berrien county, at the village of Berrien, on the fifteenth day of March, 1853, between nine o'clock in the forenoon and the setting of the sun on that day. There is claimed to be due on said mortgage at the date of this notice the sum of six hundred and fifty-four dollars and fifty-four cents on bond in said mortgage mentioned, dated May 8th, 1849.

December 28th, 1852.

ANNA H. DICKSON, *Mortgagee.*"

18 The said notice was inserted in said paper and printed and published in said paper on said 18th day of December; also on the 25th day of December, A. D. 1852, and on the first day of January, A. D. 1853, and on the eighth day of January, A. D. 1853, said notice was published in said paper the same as previously, except that the spelling of the name Dixon signed to said notice was changed to Dickson, and said notice so signed was published in said paper on said 8th day of January, A. D. 1853, and on the fifteenth & twenty-second days of January, A. D. 1853.

That on the 29th day of January, 1853, the letters in the name Dickson became misplaced so that the same read Dickens, and said notice so signed was published in said paper on said 29th day of January and on the 5th and on the 12th and on the 19th and on the 26th days of February, A. D. 1853, and on the 5th and 12th days of March, 1853.

5th. That during the whole of year 1853 Thomas Cowins was sheriff of the county of Berrien and acted as such.

6th. That on the 15th day of March, A. D. 1853, in pursuance of said notice, the said Thomas Cowins, sheriff of Berrien county, exposed the premises in said notice for sale at public vendue to

19 the highest bidder, at the front door of the court-house, in the

village of Berrien, that being the place of holding the circuit court for the said county. Said sale took place at ten o'clock in the forenoon of said day, and at said public vendue said premises were sold by said sheriff to Anna H. Dickson, the mortgagee, for the sum of six hundred and eighty-four dollars and eighty cents, that being the highest sum bid at said vendue, and she being the highest bidder thereat; that said Thomas Cowins, sheriff as aforesaid, thereupon made, executed, and delivered to said purchaser a deed of said premises and endorsed thereon the time when the same would become operative in case the premises were not redeemed according to law, and on the 24th day of March, 1853, deposited said deed with the register of deeds of Berrien county.

7th. That said premises were not redeemed within the time limited by law for such redemption, and therefore said deed became operative and was recorded in the office of the register of deeds for the county of Berrien, in Liber Z of Deed- on page 401, on the 10th day of May, 1855.

8th. That therefore, on or about the 12th day of April, 1855, said Anna H. Dickson took possession of said premises and
20 continued to hold possession thereof until on or about April 11th, 1855, when she sold and conveyed the same to Malcolm Crofoot by warranty deed, who went into possession thereof and so continued until on or about the 20th day of September, A. D. 1867, when he sold and conveyed the said premises by warranty deed to Edgar Reading, who went into possession thereof and so continued in quiet and peac-able possession thereof until the year 1876.

9th. That on the 25th day of August, 1868, Solyman Waterman filed a declaration in an action of ejectment against said Edgar Reading in the circuit court in the county of Berrien, State of Michigan, to recover the said premises, and on the 28th of September, 1868, the said Edgar Reading appeared in said action and pleaded the general issue, which action is still pending.

10th. That in the publication of the said mortgage-sale notice as aforesaid on February 12th, 1853, one of the letters "e" in the "word mortgagee following the name appended to the notice had disappeared, and in every publication thereafter said word was printed mortgage."

11th. Either party in any trial of this cause may introduce the original bond, mortgage, and sheriff's deed, with the indorsements on said deed.

21 Dated Oct. 19th, 1881.

CHAMPLIN & MORE,
Plaintiff's Attorneys.
EDWARD BACON,
Att'y for Defendants.

[Endorsed:] No. 1666. Circuit court of the United States for the sixth circuit and western *Michigan* district of Michigan, southern division. Northwestern Mutual Life Insurance Company *vs.* Lydia Bacon. Stipulation as to admitted facts. Filed May 25, 1883. H. M. Hinsdell, clerk.

22 PLAINTIFF'S EXHIBIT No. 1. May 25, '83. H. M. H., Clerk.

CHAPTER 129.

Private and Local Laws, 1857.

An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin.

The people of the State of Wisconsin represented in the senate and assembly do enact as follows:

SECTION 1. Thomas Lappin, M. C. Smith, W. W. Holden, David Noggle, Edward McKey, Solomon Hutson, James H. Knowlton, John P. Dickson, Joseph A. Sleeper, Edward L. Dimock, B. F. Pixley, John Hackett, John M. Keep, Matt. H. Carpenter, Charles Kuehn, Simeon Mills, James Niel, J. F. Willard, John Mitchell, James R. Doolittle, George C. Northrop, H. J. Ullman, Anson Eldred, H. H. Camp, J. B. Martin, Luke Stoughton, L. J. Farwell, H. L. Dousman, J. Allen Barber, John H. Rountree, George W. Lee, James H. Earnest, A. Ludlow, James Bintliff and Peter Myers, and Lucian G. Fisher, and all other persons who may hereafter associate with them in the manner hereinafter prescribed, shall be and are declared a body politic and corporate by the name of "Mutual Life Insurance Company of the State of Wisconsin," and by that name may contract and be contracted with, sue and be sued, defend and be defended against, in any and all courts.

SECTION 2. This corporation shall have no powers or privileges except such as are expressly granted by this charter.

SECTION 3. The corporation hereby created shall have the power to insure the lives of its respective members, and to make all and every insurance appertaining to or connected with life risks, and to grant and purchase annuities. The real estate which it shall be lawful for this corporation to purchase, hold, possess, and convey shall be—

1st. Such as shall be requisite for its immediate accommodation in the convenient transaction of its business.

2d. Such as shall have been mortgaged to it in good faith, by way of security, for loans previously contracted or for money due.

3d. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4th. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.

The said corporation shall not purchase, hold, or convey real estate in any other case or for any other purpose, and all such real estate as shall not be necessary for the accommodation of said company and the convenient transaction of its business shall be sold and disposed of within six years after the said company shall have acquired title to the same.

SECTION 4. Persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators, and assigns continuing to be insured in said corporation as hereinafter provided, shall thereby become members thereof during the period they shall remain insured by such corporation, and no longer.

SECTION 5. All the corporate powers of the said board of trustees and such officers and agents as they may appoint. The board of trustees shall consist of thirty-six persons, all of whom must be citizens of this State. They shall elect a president annually, who shall be a member of the corporation, and they shall have power to declare by by-laws what number of trustees less than a majority of the whole, but not less than nine, shall be a quorum for the transaction of business, and nine shall be such quorum until otherwise provided by by-laws. The trustees shall also have power to make all such by-laws as shall be needful or proper to the due exercise of the powers hereby granted.

SECTION 6. The persons named in this act shall constitute the first board of trustees, and they shall at their first meeting divide themselves by lot into four classes of nine each. The term of the first class shall expire at the end of one year; the term of the second class expire at the end of two years; the term of the third class shall expire at the end of three years; the term of the fourth class shall expire at the end of the fourth year, and so on successively each and every year. The seats of these classes shall be supplied by the members of this corporation, a plurality of the votes cast constituting a choice, but an insurance of at least one thousand dollars in amount shall be necessary to entitle any member to a vote. This section shall not be construed to prevent a trustee going out from being eligible to a re-election. The board of trustees may fill any vacancies in their number occasioned by death, resignation, or by removal from the State. The election of trustees shall be held on the first Monday of June in each and every year at such place in the city of Janesville as the board of trustees shall designate, of which they shall give at least four weeks' previous notice in two of the public newspapers printed in Milwaukee, Madison, and Janesville, and the board of trustees at the same time shall appoint three of the members of the said corporation inspectors to preside at such election, and if any of said inspectors decline or fail to attend the trustees shall appoint others to fill such vacancies.

SECTION 7. Every person who shall become a member of this corporation by effecting insurance therein shall the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees, and no premium so paid shall ever be withdrawn from said company except as hereinafter provided, but shall be liable for all the losses and expenses incurred by this company during the continuance of its charter.

23 SECTION 8. The trustees shall determine the rates of insurance and the sums to be insured.

SECTION 9. It shall be lawful for said corporation to invest the said premiums in the securities designated in the two following sections, and to sell, transfer, and change the same, and reinvest the funds of said corporation when the trustees shall deem expedient.

SECTION 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following section, shall be invested in bonds secured by mortgages or unincumbered real estate within this State. The real estate or other property to

secure such investment of capital shall in every case be worth twice the amount loaned thereon.

SECTION 11. The trustees shall have power to invest a certain portion of the premium received, not to exceed one-half thereof, in public stocks of the United States or of this State or of any incorporated city of this State.

SECTION 12. Suits at law may be maintained by said corporation against any of its members for any cause relating to the business of said corporation. Suits at law may also be prosecuted and maintained by any member against said corporation for loss by death if payment is withheld more than three months after the company is duly notified of such losses, and no member of the corporation shall be debarred his testimony as a witness in any such cause on account of interest in such suit or of his being a member of said company, and no member of the corporation not being in his individual capacity a party to such suit shall be incompetent as a witness in any such suit on account of his being a member of said company.

SECTION 13. The officers of said company, at the expiration of five years from the time that the first policy shall have been issued and bear date and within sixty days thereafter, and during the first sixty days of every subsequent period of five years, shall cause a balance to be struck of the affairs of the company, and shall credit each member with an equitable share of the profits of said company, and in case of the death of the party whose life is insured the amount standing to his credit at the last preceding striking of balance as aforesaid shall be paid over to the person entitled to receive the same. Any member who would be entitled to share in the profits who shall have omitted to pay any premium or any periodical payment due from him to the company may be prohibited by the trustees from sharing in the profits of the company. No member, except officers of the company and agents thereof, shall be personally liable for the losses of the company, and such officers and agents, severally, shall be liable, but only for the losses arising by reason of their own respective neglect or misconduct.

SECTION 14. On some day in the first thirty days after the expiration of the first five years from the time when the said company shall issue its first policy, and within the first thirty days of every subsequent five years, the officers of said company shall cause to be made a general balance statement of the affairs of said company, which shall be entered in a book prepared for that purpose, which shall be subject to the examination of every member of the company during the usual hours of business for the term of thirty days thereafter. Such statement shall contain—

1st. The amount of premiums received during said period.

2d. The amount of expenses of said company during the same period.

3d. The amount of losses incurred during said period.

4th. The balance remaining with the said company.

5th. The nature of the security on which the same is invested or loaned and the amount of cash on hand.

The said company shall also make and transmit to the secretary

of state on the first Monday of January in each year a full statement of its affairs in the same or like manner as moneyed corporations are required to do.

SECTION 15. The operations and business of this corporation shall be carried on in the city of Janesville, at such place as the trustees shall direct, so far as the same can be done at a principal office.

SECTION 16. No policy shall be issued by said company until application shall be made for insurance in the aggregate for two hundred thousand dollars at least. The trustees shall have the right to purchase for the benefit of the company all policies of insurance or other obligations issued by the said company.

SECTION 17. It shall be lawful for any married women, by herself and in her name or in the name of any third person, with his assent as her trustee, to cause to be insured for her sole use the life of her husband for any definite period or for the term of his natural life, and in case of her surviving her husband the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her to and for her own use, free from the claims of the representatives of her husband or of any of his creditors, but such exemption shall not apply where the amount of premium annually paid shall exceed three hundred dollars. In case of the death of the wife before the decease of her husband the amount of the insurance may be made payable after death to her children, for their use, and to their guardian if under age.

SECTION 18. This act shall be perpetual, but the Legislature may at any time alter or amend the same.

SECTION 19. This act is hereby declared a public act and shall be printed by the State printer immediately, and when so printed the same shall take effect and be in full force.

WYMAN SPOONER,
Speaker of the Assembly.
ARTHUR McARTHUR,
Licut. Gov. and President of Senate.

Approved March 2, 1857.
COLES BASHFORD.

24 CHAPTER 169.

Private and Local Laws, 1858.

An act to amend an act to incorporate the "Mutual Life Insurance Company" of the State of Wisconsin, approved March 2, 1857.

The people of the State of Wisconsin represented in senate and assembly do enact as follows:

SECTION 1. The Mutual Life Insurance Company of the State of Wisconsin shall have a common seal, and shall have power to make reinsurance of any risks which they may have taken, and may make all such by-laws, not inconsistent with the constitution and laws of this State, as may be deemed necessary for the appointment of its officers and agents, and the conduct of its affairs in the various

cities and towns of this State, and of sister States and foreign governments, as the said corporation may deem most for its interest.

SECTION 2. Any officer, agent, or trustee who shall be convicted of having abstracted or taken any money or evidences of debt or property belonging to this corporation, and shall have disposed of it or have placed it beyond the reach of the officers of this corporation without having first had authority from the board of trustees or from the finance committee, by a resolution entered upon their books so to do, shall be deemed guilty of a felony, and shall be adjudged to pay a fine in a sum not exceeding five times the amount of the sum proven to have been abstracted, and shall be sentenced to confinement in the State prison for not more than five years, in the discretion of any court having cognizance thereof.

SECTION 3. Any member of this company shall have the right to vote by proxy as well as in person.

SECTION 4. It is hereby declared that in the judgment of the Legislature of this State the objects of the foregoing amendments cannot be attained under general laws.

SECTION 5. This act shall take effect and be in force from and after its passage.

F. S. LOVELL,
Speaker of the Assembly.
H. H. GILES,
President of the Senate pro. tem.

Approved April 24, 1858.
ALEX. W. RANDALL.

CHAPTER 35.

Private and Local Laws, 1859.

An act to amend the charter of the "Mutual Life Assurance Company" of the State of Wisconsin.

The people of the State of Wisconsin represented in senate and assembly do enact as follows:

SECTION 1. The annual report required to be made by section one of chapter one hundred and three of the General Laws of 1858 may be made by the "Mutual Life Assurance Company" of the State of Wisconsin in the month of June of each and every year.

SECTION 2. The words "in the city of Janesville," where they occur in the sixth and fifteenth sections of the act incorporating said company, are hereby stricken out.

SECTION 3. This act shall take effect and be in force from and after its passage.

WM. P. LYON,
Speaker of the Assembly.
E. D. CAMPBELL,
Lieutenant Governor and President of the Senate.

Approved February 23, 1859.
ALEX. W. RANDALL.

25 CHAPTER 323.

General Laws, 1863.

An act to amend chapter one hundred and twenty-nine of the Private and Local Laws of 1857, entitled "An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin."

The people of the State of Wisconsin represented in senate and assembly do enact as follows:

SECTION 1. Section five of chapter one hundred and twenty-nine of the Private and Local Laws of 1857, entitled "An act to incorporate the 'Mutual Life Insurance Company of the State of Wisconsin,'" is hereby so amended as to read as follows, viz:

"SECTION 5. All the corporate powers of the said company shall be vested in and exercised by a board of trustees and such committees and officers and agents as they may appoint. The board of trustees shall consist of thirty-six persons. They shall elect a president annually, who shall be a trustee and a member of the corporation, and they shall have power to declare by by-law what number of trustees, less than a majority of the whole, but not less than nine, shall be a quorum for the transaction of business, and nine shall be such quorum until otherwise provided by by-law. The trustees shall have power to make all such by-laws as shall be needful or proper to the exercise of the powers hereby granted."

SECTION 2. Section six of the said act is hereby so amended as to read as follows, viz:

"SECTION 6. The persons named in this act shall constitute the first board of trustees, and they shall at their first meeting divide themselves by lot into four classes of nine each. The term of the first class shall expire at the end of one year; the term of the second class shall expire at the end of two years; the term of the third class shall expire at the end of three years; the term of the fourth class shall expire at the end of the fourth year, and so on successively each and every year. The seats of these classes shall be supplied by the members of this corporation, a plurality of the votes cast constituting a choice, but an insurance of at least one thousand dollars in amount shall be necessary to entitle any member to a vote. This section shall not be construed to prevent a trustee going out from being eligible to a re-election. The board of trustees may fill any vacancies in their number occasioned by death, resignation, or in any other manner. The election of trustees shall be held at the office of said company, in the city of Milwaukee, on the second Wednesday of June in each year, of which they shall give at least four weeks' previous notice in one or more of the public newspapers printed in Milwaukee and Madison, and the board of trustees, at the same time, shall also appoint three of the members of the said corporation inspectors to preside at such election; and if any of said inspectors decline or fail to attend, the trustees shall appoint others to fill such vacancies."

SECTION 3. Section ten of the said act is hereby so amended as to read as follows, viz:

"SECTION 10. The whole of the premiums received for insurance by said corporation, except as provided for in the following section, shall be invested in bonds secured by mortgages on unincumbered real estate. The real estate or property to secure such investment or capital shall in every case be worth twice the amount loaned thereon."

SECTION 4. Section eleven of said act is hereby so amended as to read as follows, viz:

SECTION 11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this State, or of any incorporated city of this State, and the company may loan to policyholders in said company, from time to time, sums not exceeding one-half of the annual premiums on their policies, upon notes to be secured by the policy of the person to whom the loans may be made."

SECTION 5. The said company may cause a balance to be struck of the affairs of said company, and a dividend of its profits to be made among the members thereof, as provided in section thirteen of the said act of incorporation thereof, annually, biennially, triennially, or once in five years, as the board of trustees may determine, and the dividend of profits when so made may, at the option of each member entitled thereto, and with the consent of the board of trustees, be appropriated to the purchase of additional insurance, or in reduction of or toward the payment of annual premiums, or credited to the insured, to be paid over at the decease of the insured to the person entitled to receive the same, in the same manner and upon the same conditions as the amount insured by the policy of such member.

SECTION 6. This act shall take effect and be in force from and after its passage.

J. ALLEN BARBER,
Speaker of the Assembly.
WYMAN SPOONER,
President of the Senate.

Approved March 23, 1863.
EDWARD SALOMON, *Governor.*

26 CHAPTER 1.

General Laws, 1865.

An act to change the name of the "Mutual Life Insurance Co." of the State of Wisconsin.

The people of the State of Wisconsin represented in the senate and assembly do enact as follows:

SECTION 1. That the corporate name of the Mutual Life Insurance Company of the State of Wisconsin, a corporation duly created by and organized pursuant to an act entitled "An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1887, and the several acts amendatory thereof, be, and the same is hereby, changed to "The Northwestern Mutual Life Insur-

ance Company," and by the latter name the said "The Mutual Life Insurance Company of the State of Wisconsin" shall hereafter be known in all courts and places, and enjoy the same corporate rights and franchises and be subject to the same duties, obligations, and liabilities as by said former name; and the said corporation may hereafter sue and be sued, plead and be impleaded, answer and be answered unto, in all courts and places by the said name of "The Northwestern Mutual Life Insurance Company" for, upon, and by reason of any contracts, liabilities, or cause of action made, had, incurred, or suffered by said corporation prior to the time this act shall take effect, with the same effect and in the same manner as if the same had been made, had, incurred, or suffered in and by the said name of "The Northwestern Mutual Life Insurance Company."

SECTION 2. The annual meeting of the members of said company for the purpose of electing trustees thereof shall, after the year (A. D.) 1865, be held on the second Wednesday of January in each year, and the trustees who shall be elected at the annual meeting of the said company, which shall be held on the second Wednesday of June, A. D. 1865, shall hold their offices until the second Wednesday of January, one thousand eight hundred and sixty-nine, and the term of office of those trustees now in office, which would expire but for the passage of this act on the second Wednesday of June, in the year one thousand eight hundred and sixty-six, one thousand eight hundred and sixty-seven, and one thousand eight hundred and sixty-eight, shall expire, and their successors may be chosen at the annual meeting to be held on the second Wednesday of January in each of said years respectively. The trustees elected at the annual meeting to be held on the second Wednesday of January, A. D. 1866, and annually thereafter, shall hold their respective offices for four years unless sooner removed according to law.

SECTION 3. This act shall take effect and be in force from and after the first day of March, A. D. one thousand eight hundred and sixty-five.

WM. W. FIELD,
Speaker of the Assembly.
WYMAN SPOONER,
President of the Senate.

Approved January 20, 1865.
JAMES T. LEWIS,
Gov. Wisconsin.

CHAPTER 371.

Private and Local Laws, 1869.

An act to amend an act entitled "An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2d, 1857, and the several acts amendatory thereof.

The people of the State of Wisconsin represented in senate and assembly do enact as follows:

SECTION 1. Section eleven of an act entitled "An act to incorporate

the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, is hereby so amended as to read as follows: "Section 11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this State, or of any incorporated city of this State; and the company may loan to policy-
holders in said company, from time to time, sums not exceed-
27 ing one-half the annual premiums on their policies, upon notes to be secured by the policy of the person to whom the loans may be made: Provided, however, That the said trustees are hereby authorized, at their discretion, to invest so much of the assets of the said company in the State bonds or other securities of any State of the United States in which they may desire to transact the business of life insurance as may be necessary to comply with the requirements of the laws of such State relating to life insurance companies incorporated by other States."

SECTION 2. This act shall take effect and be in force from and after its passage.

A. M. THOMSON,
Speaker of the Assembly.
G. C. HAZELTON,
President of the Senate pro Tem.

Approved March 9, 1869.
LUCIUS FAIRCHILD, *Governor.*

CHAPTER 329.

Private and Local Laws, 1870.

An act to amend chapter 129 of the Private and Local Laws of 1857, entitled "An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, the name of which has since been changed to the "Northwestern Mutual Life Insurance Company," and the several laws amendatory thereof.

The people of the State of Wisconsin represented in senate and assembly do enact as follows:

SECTION 1. Chapter 129 of the Private and Local Laws of 1857, entitled "An act to incorporate the Mutual Life Insurance Company of the State of Wisconsin," approved March 2, 1857, the name of which corporation was changed to the "Northwestern Mutual Life Insurance Company" by an act entitled "An act to change the name of the Mutual Life Insurance Company of the State of Wisconsin," approved January 20, 1865, and published and designated as chapter one of the Supplement to Private and Local Laws of 1865, is hereby amended by inserting in the said original act, immediately after section eighteen, the following, to stand as sections 19, 20, and 21:

"SECTION 19. The annual meeting of the members of the said Northwestern Mutual Life Insurance Company for the purpose of electing trustees thereof shall be hereafter held on the last Wednesday of January in each year, and the trustees elected at each annual election hereafter held shall hold their respective offices for four years, unless sooner removed according to law, except such as may

be elected to fill vacancies, who shall hold their respective offices until the expiration of the term of office of the class of trustees to which they may respectively belong. The trustees now in office shall hold their respective offices until the day of the annual election at which their successors are to be elected, pursuant to this section, unless sooner removed according to law.

"SECTION 20. No person shall be eligible to the office of trustee of the said company unless he shall have effected an insurance upon his own life for the benefit of himself, his wife, heirs or representatives, for at least five thousand dollars, which shall be in full force and effect, on which he shall have paid the premium for at least one year. Every trustee of the said company shall, during his whole term of service, be a citizen of the United States, and at least two-thirds of all the trustees of the said company who may be hereafter elected shall have resided in this State one year next preceding their election and be residents of the same during their continuance in office. The number of persons eligible to the office of trustee in said company equal to the number of trustees to be elected at each annual election, who shall receive the highest number of votes cast thereat, shall be chosen trustees. An insurance of at least one thousand dollars effected by a person upon his own life, or upon the life of another for his own benefit or the benefit of his wife, heirs or personal representatives, shall be necessary to entitle any member to a vote, and each member shall be entitled to one vote for each one thousand dollars of insurance he may have effected in said company as aforesaid, such insurance being in force at the time of the election.

"SECTION 21. Members of said company may vote by proxies dated and executed within sixty days next preceding, and returned to the chief office of the said company for examination and registry upon the books of the company at least three days previous to the meeting of the members of the company at which the same are to be used; but no person shall be allowed to cast by proxy more than one hundred votes in addition to the votes to which he may be entitled as a member of the company on his own insurance, and no officer, trustee, agent or employee of said company shall act or be entitled to vote as proxy for an absent member.

28 SECTION 2. Section nineteen of said original act is hereby numbered section 22, and section two of chapter one of the supplement to the private and local laws of 1865, entitled "An act to change the name of the Mutual Life Insurance Company of the State of Wisconsin," approved January 20, 1865, and all provisions of the act of which this act is amendatory conflicting with the provisions of this act are hereby repealed.

SECTION 3. This act shall take effect and be in force from and after its passage.

J. M. BINGHAM,
Speaker of the Assembly.
THAD. C. POUND,
President of the Senate.

Approved March 15th, 1870.
LUCIUS FAIRCHILD, *Governor.*

STATE OF WISCONSIN, } ss:
Department of State, }

I, Hans B. Warner, secretary of state of the State of Wisconsin and keeper of the great seal thereof, do hereby certify that the foregoing copies of chapter 129 of the private and local laws of 1857, chapter 169 of the private and local laws of 1858, chapter 35 of the private and local laws of 1859, chapter 328 of the general laws of 1863, chapter 1 of the general laws of 1865, chapter 371 of the private & local laws of 1869, and chapter 329 of the private and local laws of 1870 have been compared by me with the original enrolled acts in this office, and that the same are true copies thereof and of the whole of such original enrolled acts.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at the capitol, in the city of Madison, this 22d day of April, A. D. 1881.

[Great Seal of the State of Wisconsin.]

HANS B. WARNER,
Secretary of State.

28½ [Endorsed:] Copy of original act of incorporation of the Northwestern Mutual Life Insurance Co. and of acts amendatory thereof prior to April, 1875. Filed May 25, 1883. H. M. Hinsdill, clerk.

29 *Master's Deed.*

This indenture, made the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and seventy-nine, between Chester B. Hinsdill, a master in chancery of the circuit court of the United States for the western district of Michigan, residing in the city of Grand Rapids, Michigan, party of the first part, and the Northwestern Mutual Life Insurance Company, party of the second part, witnesseth:

Whereas, at a session of the circuit court of the United States for the western district of Michigan, in chancery, sitting at the United States court-rooms, in the city of Grand Rapids, on the twenty-first day of July, in the year one thousand eight hundred and seventy-nine, it was, among other things, ordered, adjudged and decreed by said court, in a certain cause then pending in said court between The Northwestern Mutual Life Insurance Company, complainant, and Edgar Reading, Amelia M. Reading, Frank D. Patterson, Matthew S. Baldwin, Henry H. Coolidge, Delevan A. Smith, Sheldon Bronson, Charles H. Hilton, and Noah P. Loveridge, administrator of the estate of Orville S. Abbott, deceased, defendants, that all and singular the mortgaged premises mentioned and set forth in the pleadings in said cause, or so much thereof as may be necessary to satisfy the amount due said complainant for principal and interest and costs of this suit, be sold, by or under the direction of one of the masters of this court, at public auction, in the county where the said mortgaged premises or the greater part thereof are situated, the said master first giving public notice of the time and

place of said sale according to the course and practice of said court.

And whereas the said party of the first part to these presents, in pursuance of the order and decree of the said court, did, on the twenty-first day of October, in the year one thousand eight hundred and seventy-nine, sell at public auction, at the court-house in Berrien Springs, in the county of Berrien, the said mortgaged premises hereinafter particularly described, having first given the previous notice of the time and place of said sale, as required by the order and decree aforesaid; at which sale the premises were struck off to the said party of the second part to these presents for the sum of seven thousand five hundred ($7,500.00) dollars, that being the highest sum bidden for the same, and he the highest bidder:

30 Now, therefore, this indenture witnesseth: That the said Chester B. Hinsdill, master in chancery and the party of the first part to these presents, in order to carry into effect the said sale so made as aforesaid, in pursuance of the said decree and order of said court, and also by virtue of the statute in such case made and provided, and in consideration of the premises and of the sum of seven thousand five hundred ($7,500.00) dollars, paid by the said party of the second part to these presents, to the said party of the first part hereto, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part and to its successors and assigns forever all the following lands and premises, to wit:

The following real estate, lying and being in the county of Berrien and State of Michigan and known and described as follows, viz: Lot number twenty-seven (27) in William Justice's Addition to Niles, as designated on the recorded plat thereof, recorded in Book "C," page 627, together with the privileges and appurtenances to the same belonging and all of the rents, issues, and profits which may arise or be had therefrom.

Together with all and singular the rights, titles, members, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining; to have and to hold the said premises above described and hereby intended to be granted and conveyed unto the said party of the second part, its successors and assigns, to it and its only proper use, benefit, and behoof forever.

31 In witness whereof the said party of the first part, master in chancery as aforesaid, has hereunto set his hand and seal the day and year first above written.

CHESTER B. HINSDILL, [SEAL.]
Master in Chancery in and for the Western District of Michigan.

Signed, sealed, and delivered in the presence of—
HENRY M. HINSDILL.
JOHN McQUEWAN.

STATE OF MICHIGAN, } ss:
County of Kent, }

On this twenty-eighth day of October, A. D. 1879, before the undersigned personally appeared Chester B. Hinsdill, master in chancery of the circuit court of the United States for the western district of Michigan, known to me to be the person described in and who executed the above indenture, and acknowledged that he executed the same freely for the uses and purposes therein mentioned.

JOHN McQUEWAN,
Notary Public, Kent Co., Mich.

Recorded December 31st, A. D. 1879, at 3 o'clock p. m.
WM. H. MARSTON, *Register.*

STATE OF MICHIGAN, } ss:
County of Berrien, }

I, William H. Marston, register of deeds in and for said county, do hereby certify that I have compared the annexed copy with the original instrument as recorded in the records of Berrien county, in Liber 64 of Deeds, on page 304, and, further, that the same is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Berrien Springs, this 22d day of July, A. D. 1880.

[SEAL.] WM. H. MARSTON,
Register of Deeds.

32 PL'FF'S EXHIBIT No. 4. H. M. H. May 25, 1883.

STATE OF MICHIGAN, } ss:
County of Berrien, }

Circuit Court for the County of Berrien, State of Michigan, ss.

Solyman Waterman, plaintiff in this suit, by Charles Jewett, his attorney, complains of Edgar Reading, defendant in this suit, in a plea of ejectment, for that whereas the said plaintiff, on the first day of July, in the year one thousand eight hundred and sixty-eight, was possessed of the following real estate and premises, situate in the city of Niles, county of Berrien, in said State of Michigan, being known and designated as lot number twenty-seven in William Justice plat of the village (now city) of Niles, which said premises said plaintiff claims in fee, and he, the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit, on the said first day of July, in said last-mentioned year, entered into said premises and ejected the said plaintiff therefrom and unjustly withholds from said plaintiff the possession thereof, to the damage of said plaintiff ten thousand dollars, and therefore brings suit, &c.

CHARLES JEWETT,
Attorney for Plaintiff.

The plaintiff being a non-resident of the State I hereby agree to become security for costs in this cause and to pay to defendant such costs as he may recover herein.

CHARLES JEWETT.

[55. Aug. 25, '68. Stamp. 55.]

33 STATE OF MICHIGAN, } ss:
Berrien County, }

I hereby certify and return that on the 19th day of September, A. D. 1868, I served the within declaration, personally, on Edgar Reading by delivering to him, said defendant, a true copy of the within declaration.

J. M. SEWARD, *Sheriff.*

Fees, $2.00.

Filed Sept. 30th, 1868.

GEORGE H. MURDOCK, *Clerk.*

[Endorsed:] The cir. c't for the Co. of Berrien. Solyman Waterman *vs.* Edgar Reading. Narr. C. Jewett, pl'ff's att'ys, to Edgar Reading: Take notice that on filing the declaration in this cause (of which the within is a copy) a rule was entered in the Book of Common Rules kept by the clerk of this court at his office, in the village of Berrien, requiring the defendant within named to plead to said declaration within twenty days after service of a copy thereof, and notice of said rule or judgment, &c. Dated at Niles this 25th day — August, 1868. Yours, &c. C. Jewett, plaintiff'- attorney. August 25, 1868. Ch's E. Howe, clerk.

34 STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

SOLYMAN WATERMAN *vs.* EDGAR READING.

AUGUST 25, 1868.

On reading and filing the declaration filed pursuant to the statute as commencement of suit, on motion of Charles Jewett, attorney for plaintiff—

Ordered, That the defendant plead to such declaration within twenty days after service on him of a copy thereof, together with notice of this rule, or judgment will in this cause be rendered against him.

35 STATE OF MICHIGAN, } ss:
County of Berrien, }

Circuit Court for the County of Berrien.

SOLYMAN WATERMAN, Plaintiff,
vs.
EDGAR READING, Defendant.

And now comes the said defendant, Edgar Reading, into court, by his attorneys, H. H. Coolidge & Son, and demands a trial of the matters contained in the plaintiff's said declaration.

H. H. COOLIDGE & SON,
Attorneys for Defendant.

Filed Sept. 28th, 1868.

GEO. H. MURDOCK, *Clerk.*

Circuit Court for the County of Berrien.

SOLYMAN WATERMAN, Pl't'ff, *vs.* EDGAR READING, Def't.

And now the said defendant, Edgar Reading, comes into court, by his attorneys, H. H. Coolidge & Son, and demands a trial of the matters contained in the plaintiff's said declaration.

H. H. COOLIDGE & SON.

Filed Oct. 9th, 1868.

GEORGE H. MURDOCK, *Clerk.*

36 STATE OF MICHIGAN:

In the Circuit Court for the County of Berrien.

MONDAY, *November 8th*, 1880.

Present: Hon. Andrew J. Smith, circuit judge.
The court was opened for business in due form.

SOLYMAN WATERMAN *vs.* EDGAR READING.

Ejectment.

In this cause, the parties being in court, by their respective attorneys, ready for trial, thereupon came a jury, to wit: Charles H. French, Horace Holden, Charles L. Davis, David A. Knight, George A. Carrell, Edward S. Boyd, Eli Gage, William Camfield, William Watson, Samuel W. Becker, J. M. Vanderburg, and Andrew J. Tibbs, good and lawful men, who, being duly chosen, tried, and sworn well and truly to try the issue between the parties, heard the proofs and allegations of the parties and the arguments of counsel.

ANDREW J. SMITH,
Circuit Judge.

STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

SOLYMAN WATERMAN, Pl't'ff, *vs.* EDGAR READING, Def't.

Ejectment.

37 It is hereby stipulated by and between the parties to this suit, by their respective attorneys, that the facts hereinafter stated are true, and that this stipulation may be read in evidence on any trial of this cause by either party and shall be sufficient evidence of said facts without other or further proof thereof, viz:

1. That on the eighth day of May, A. D. 1849, Solyman Waterman, the plaintiff in this suit, was the owner in fee of lot number twenty-seven (27) in that part of the village of Niles, Berrien county, laid out by William Justice, and that said premises are the same premises described in plaintiff's declaration in this cause.

2. That on said 8th day of May, A. D. 1849, the said plaintiff executed and delivered to Anna H. Dickson a mortgage upon said premises to secure the payment to her of fourteen hundred dollars and interest, it being a purchase-money mortgage, which mortgage

was recorded in the office of the register of deeds for the county of Berrien, on the eleventh day of May, A. D. 1849, in Liber E of Mortgages, page- fifty-one and fifty-two; that said mortgage contained the usual power of sale in case of default of the payment of the principal or interest at the times and manner therein specified.

3. That on or before the 18th day of December, A. D. 1852, default had been made by said Solyman Waterman in the payment of the sum secured to be paid by said mortgage, and that on said 18th day of December, 1852, there was due and unpaid on said mortgage the sum of six hundred and sixty-four dollars and fifty cents,
38 and that no proceedings at law had been instituted to recover any part of said debt.

4. That on the 18th day of December, A. D. 1852, the said Anna H. Dickson took proceedings to foreclose said mortgage, under and by virtue of the power of sale therein contained, by advertisement, under the statute in such case made and provided, and on that day inserted in the Niles Republican, a newspaper printed, published, and circulated in said county of Berrien weekly, a notice of mortgage sale as follows:

Mortgage Sale.

"Default having been made in the payment of a sum secured by mortgage by Solyman Waterman to Anna H. Dixon, both of Niles, in the State of Michigan, dated the eighth day of May, 1848, and recorded in Book E of Mortgages, in the office of the register of deeds of Berrien county in said State, on the eleventh day of May, 1849, at two and one-fourth o'clock afternoon, on pages fifty-one and fifty-two, the premises described in said mortgage being lot number twenty-seven in that part of the village of Niles, in said county, laid out by William Justice, pursuant to a power of sale contained in said mortgage, and no suit or proceeding having been instituted at law to recover any part of the debt secured by said mortgage, the premises in said mortgage described will be sold at the court-house door, in Berrien county, at the village of Berrien, on the fif-
39 teenth day of March, 1853, between nine o'clock in the forenoon and the setting of the sun on that day.

There is claimed to be due on said mortgage at the date of this notice the sum of six hundred and fifty-four dollars and fifty-four cents on bond in said mortgage mentioned, dated May 8th, 1849.

Dec. 28th, 1852.

ANNA H. DIXON, *Mortgagee.*"

That said notice was inserted in said paper and printed and published in said paper on said 18th day of December; also on the 25th day of December, A. D. 1852, and on the first day of January, A. D. 1853, and on the 8th day of January, A. D. 1853, said notice was published in said paper the same as previously, except that the spelling of the name "Dixon" signed to said notice was changed to "Dickson," and said notice so signed was published in said paper on said 8th day of January, 1853, and on the 15th and on the 22nd days of January, A. D. 1853; that on the 29th day of January,

1853, the letters in the name "Dickson" signed to said notice became misplaced so that the name read "Dickons," and said notice so signed was published in said paper on said 29th day of January and on the 5th, on the 12th, on the 19th, and on the 26th of February, A. D. 1853, and on the 5th and 12th days of March, 1853.

5. That during the whole of the year 1853 Thomas Comins
40 was sheriff of the county of Berrien and acted as such.

6. That on the 15th day of March, A. D. 1853, in pursuance of said notice, the said Thomas Comins, sheriff of Berrien county, exposed the premises described in said notice for sale at public vendue to the highest bidder, at the front door of the court-house, in the village of Berrien, that being the place of holding the circuit court of said county, pursuant to the statute in such case made and provided, and at said public vendue said premises were sold by said sheriff to Anna H. Dickson, the mortgagee, for the sum of six hundred and eighty-four dollars and eighty cents, that being the highest sum bid at said vendue, and she being the highest bidder thereat; that said Thomas Comins, sheriff as aforesaid, thereupon made and executed and delivered to said purchaser a deed of said premises and endorsed thereon the time when the same would become operative in case the premises were not redeemed according to law, and on the 24th of March, A. D. 1853, deposited said deed with the register of deeds of Berrien county.

7. That said premises were not redeemed within the time limited by law for such redemption, and thereupon said deed became operative and was recorded in the office of the register of deeds for the county of Berrien, in Liber Z of Deeds on page 401, on the 10th day of May, A. D. 1855.

41 8. That thereupon and on or about the 15th day of May, A. D. 1855, the said Solyman Waterman surrendered the possession of the premises to Anna H. Dickson, who went into possession thereof and so continued until on or about April 11th, 1855, when she sold and conveyed the same to Malcolm Crofoot by warranty deed, who went into possession thereof and so continued until on or about the 20th day of September, A. D. 1867, when he sold and conveyed the said premises by warranty deed to Edgar Reading, the defendant in this suit, who went into possession thereof and so continued and was in the quiet and peaceable possession thereof at the time of the commencement of this suit.

C. JEWETT, *Pl'ff's Att'y.*
CHAMPLIN & MORE,
Att'ys for Def't.

Filed November 8th, 1880.

EDWIN D. COOKE, *Clerk.*

42 SOLYMAN WATERMAN *vs.* EDGAR READING.

Now comes said defendant and requests the court to charge the jury (E. Bacon, for pl't'ff)—

I.

The notice or advertisement of mortgage sale put in evidence in this case is insufficient. Gr't.

II.

The title in fee to the premises described in this declaration did not pass by virtue of the statutory foreclosure proceedings. Gr't.

III.

It is essential that the advertisement should purport to have been given by Anna H. Dickson, the mortgagee, and if there are three or four publications purporting to be signed as follows, Anna H. Dickson, mortgage, the advertisement is void and the title did not pass. Refused.

IV.

The jury are instructed to render a verdict for the plaintiff. Refused.

V.

There is no valid defence in this suit. Refused.

VI.

The plaintiff is entitled to recover in this suit. Refused.

VII.

The advertisement is void unless it gave the true date of the mortgage. Refused.

43 IX.

The advertisement does not give the date of the mortgage. Refused.

X.

The advertisement purported to be dated December 28th, 1852, and the sale was therefore illegal. Refused.

Filed November 8th, 1880.

EDWIN D. COOK, *Clerk.*

44 STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

EDGAR READING *ads.* SOLYMAN WATERMAN.

The counsel for the defendant requests the court to charge the jury as follows:

1. It is a conceded fact in this case that the plaintiff was the owner in fee of the premises described in plaintiff's declaration on the 8th day of May, A. D. 1849. Gr't.

2. That defendant was in possession of the premises at the time of bringing this suit. Gr't.

3. It is also admitted that on the 8th of May, 1849, Waterman executed a mortgage covering these premises to Anna H. Dickson; that it was recorded in the register's office of Berrien county, on the 11th day of May, 1849, in Liber E of Mortgages, on pages 51 & 52,

and that it contained the usual power of sale and was given to secure the payment to her of $1,400 and interest; that default had been made in the payment of the sum secured by this mortgage on the 18th day of December, A. D. 1852, and that she took steps to foreclose the same by advertisement, and on that day inserted a notice of sale in the Niles Republican, a newspaper printed, published, and circulated in Berrien county. The contents of this notice are admitted. The notice was published the requisite length
45 of time and was sufficient, under the statute of this State, to authorize a sale of the mortgage premises under the power of sale therein contained. Refused.

4. By the evidence in this case the sale was regular and the premises were struck off to the said Anna H. Dickson, and a deed of the premises was executed by the sheriff to her, and the same was left with the register of deeds for the county of Berrien on the 24th of March, 1853. The premises not having been redeemed within the time allowed by law, by virtue of the foreclosure under the power of sale and neglect to redeem, the title of Solyman Waterman became divested and vested in Anna H. Dickson. Refused.

5. Upon all the evidence in this case the defendant is entitled to recover, and your verdict should be for the defendant. Refused.

Filed November 8th, 1880.

E. D. COOKE, *Clerk.*

46 In the Circuit Court for the County of Berrien.

Present: Hon. Andrew J. Smith, circuit judge.
The court was opened for business in due form.

SOLYMAN WATERMAN *vs.* EDGAR READING.

Ejectment.

TUESDAY, *November* 9th, 1880.

In this cause the jury heretofore empanneled and sworn sat together and, after hearing the charge of the court, retired from the bar thereof under the charge of Andrew W. Mars, an officer of the court duly sworn for that purpose, to consider of their verdict to be given, and after being absent for a time return into court and say upon their oath that they find that the said defendant is guilty of unlawfully withholding from the said plaintiff the premises described as lot number twenty-seven in William Justice plat of the village (now city) of Niles, and that the said plaintiff is well entitled to hold the same in fee, as the said plaintiff hath in his declaration in this cause complained against him, and they assess the damages of the said plaintiff by reason of the matters aforesaid at the sum of six cents.

Therefore, on motion of E. Bacon, attorney for plaintiff, it is ordered and adjudged by the court now here that the said plaintiff do recover against the said defendant the possession of the said premises
47 according to the verdict of the said jury, and that the said plaintiff have a writ of possession therefore; and it is further

ordered and adjudged by the said court that the said plaintiff do recover against the said defendant the damages aforesaid, together with his costs and charges by him about his suit in this behalf expended to be taxed, and that the said plaintiff have execution therefor.

ANDREW J. SMITH,
Circuit Judge.

48 STATE OF MICHIGAN, } ss:
Berrien County, }

I, Edwin D. Cooke, clerk of the circuit court of said county, which is a court of record, do hereby certify that I have compared the foregoing copy of the declaration, certificate of service, rule to plead, plea, requests of plaintiff and defendant, and judgment entered in the cause of Solyman Waterman, plaintiff, *vs.* Edgar Reading, defendant, with the original record thereof now remaining in the office of the clerk of said court of said county, and have found the same to be a correct transcript therefrom and the whole of such original record, and that the bill of exceptions hereto attached is the original bill of exceptions as filed in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Berrien Springs, this 30th day of December, A. D. 1880.

[SEAL.] EDWIN D. COOKE, *Clerk.*

49 STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

EDGAR READING *ads.* SOLYMAN WATERMAN.

At a session of said court held at the court-house, in Berrien Springs, in said county of Berrien, on the eighth day of November, A. D. 1880, before the Honorable Andrew J. Smith, circuit judge, the issue joined between the parties to this cause came on to be tried by a jury of the said county of Berrien, for that purpose duly empanneled, good and lawful men of the said county, at which day came there as well the said plaintiff as the said defendant, by their respective attorneys, and the jury of the jurors aforesaid empanneled to try the said issue also came and were then and there duly chosen and sworn to try the issue aforesaid between the parties aforesaid; and upon the trial of the issue aforesaid the counsel for the said plaintiff, to maintain and prove the said issue on his part, gave in evidence a deed, recorded in the office of the register of deeds of Berrien county, in Liber R of Deeds on page 614, whereby Anna H. Dickson granted to Solyman Waterman lot numbered twenty-seven in William Justice's plat of the village (now city) of Niles.

And, further to maintain and prove said issue on his part, said plaintiff introduced as a witness David Bacon, who, being duly sworn, testified that he had resided in Niles and vicinity since 1852 and in Cass county since 1835; that he had been in Niles frequently in 1852, and had uncles and cousins living there; that Niles was

the market place for almost entirely the whole county; that
50 he knew Solyman Waterman in the summer of 1850, and also lot 27 above described; that in 1850 Waterman was keeping a hotel that was known as the "Old Diggins" on this lot 27. It was an old frame hotel, and he thought it was the first hotel in Niles. Waterman was in possession of this lot and keeping a hotel there at that time, and he continued there until the spring of 1851, when he rented it to Mr. Rounds, who kept it until 1854 as a hotel. While Waterman was there he claimed as owner and purchaser from Mrs. Dickson. That he knew Edgar Reading, the defendant in this suit. Reading bought it in 1867. This suit was commenced in 1868 and Reading was then in possession of this lot 27. Reading continued in possession from the spring throughout the year 1868. He built his hotel there in 1868 and was in possession for a number of years afterwards.

On cross-examination witness testified as follows:

He commenced to build the hotel in the spring of 1868 and completed it the ensuing year. He went into possession in the fall of 1867 and tore down the old hotel during the winter. Malcolm Crofoot was in possession of this lot immediately before Reading. He was the — and was keeping a hotel there at the time. He was the man in possession and claimed to be the owner. Crofoot got it from Anna H. Dickson. The premises were leased from '51 to '54 by Henry Rounds, who rented from Solyman Waterman. Crofoot went into possession under Mrs. Dickson in 1855. It was the general understanding that she foreclosed a mortgage. That he (witness) is a married man, and that his wife's name is Lydia A. Bacon; that he is not a relative of Solyman Waterman; knows that on the 17th of October, 1880, he was living in California; that he (witness) had never had any correspondence with Waterman directly, but had indirectly; that he (witness) had negotiated for the purchase of this property; that he could hardly tell what this property is worth, but it cost a great deal of money. Dr. Reading claimed that the whole property on this lot and the other lot cost him seventy thousand dollars. This takes one-half; in his (witness') judgment, in the
51 condition it is now in this lot ought to be worth fifteen thousand dollars—from twelve to fifteen thousand; that he (witness) negotiated for the purchase of this property from Waterman.

Question. Did you pay any consideration?

Ans. Yes, sir.

Ques. Did you pay the consideration named in the deed?

Ans. Yes, sir.

Ques. Three hundred dollars?

Ans. Yes, sir; about five hundred dollars is what it cost me; three hundred dollars is what I paid him.

Ques. Who did you have it conveyed to?

Ans. Lydia A. Bacon.

Ques. That is, your wife?

Ans. Yes, sir.

Ques. Did you have any title before this deed?

Ans. Only by agreement with Mr. Waterman.
Ques. Did you have a written agreement with him?
—. Not with him, but with Charles Hoppin, in California.
Ques. Who is he?
Ans. He is a gentleman that lives in California.
Ques. What place?
Ans. He lives in Yolo county, near Yolo.
Ques. Is that where Waterman lives?
Ans. Waterman makes his home with Hoppin, except when he is with his children at San Francisco.

On redirect examination the witness testified:

That when he speaks of this property being worth $15,000 he speaks of it as it stands to-day. There are three 20-foot stores, and he should think it worth twelve thousand dollars. Without any buildings on it he thinks it would be worth from five to six thousand dollars.

Ques. What would be your judgment that it would be worth with the old buildings as it stood when Reading purchased?

Ans. I should say, with the old building to-day, it ought to be worth $6,000—half of it. The building, as it stands now, is impracticable for any use. It cost a great deal of money. A building that would cost a quarter of that would be worth absolutely just as much money.

Ques. That is, the present building on it?
Ans. Yes, sir.
Ques. I asked you with the old building?
Ans. I think it ought to be worth six thousand dollars. The old frame hotel was torn down. I think the old building was
52 worth $1,000. The naked lot ought to be worth from four to five thousand dollars. It is sixty-six foot front. I don't suppose it could be bought for less than that.
Ques. Less than that?
Ans. It ought to be worth one hundred dollars a foot. I should say it was well worth from four to five thousand dollars. Property sold two years ago just above there for two hundred dollars a foot.
Ques. You have been enquired of on your cross-examination as to Mrs. Dickson's getting this property under a mortgage foreclosure as against whom?
Ans. Mr. Solyman Waterman.
Ques. State whether it was supposed to be the purchase-money.
Ans. I suppose so. I know nothing about only what the records show. (That as agent of Lydia A. Bacon he entered into peaceable possession of said premises described in the declaration about a year prior to the time of trial; that he found the premises vacant and he took possession and still remains in possession thereof.)

The plaintiff hereupon rested his case.

And the said defendant, to maintain and prove said issue on his part, then read the stipulation of facts signed by the attorneys of

record in the case as follows:

STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

SOLYMAN WATERMAN, Plaintiff,

vs.

EDGAR READING, Defendant.

Ejectment.

It is hereby stipulated by and between the parties to this suit, by their respective attorneys, that the facts hereinafter stated are true, and that this stipulation may be read in evidence on any trial of this cause by either party, and shall be sufficient evidence of said facts without other or further proof thereof, viz:

1. That on the eighth day of May, A. D. 1849, Solyman
53 Waterman, the plaintiff in this suit, was the owner in fee of lot number twenty-seven (27), in that part of the village of Niles, Berrien county, laid out by William Justice, and that said premises are the same premises described in plaintiff's declaration in this cause.

2. That on said 8th day of May, A. D. 1849, the said plaintiff executed and delivered to Anna H. Dickson, a mortgage upon said premises to secure the payment to her of fourteen hundred dollars and interest, it being a purchase-money mortgage, which mortgage was recorded in the office of the register of deeds for the county of Berrien, on the eleventh day of May, A. D. 1849, in Liber E of Mortgages, at pages fifty-one and fifty-two; that said mortgage contained the usual power of sale in case of default of the payment of the principal or interest at the times and manner therein specified.

3. That on and before the 18th day of December, A. D. 1852, default had been made by said Solyman Waterman in the payment of the sum secured to be paid by said mortgage, and that on said 18th day of December, 1852, there was due and unpaid on said mortgage the sum of six hundred and sixty-four dollars and fifty cents, and that no proceedings at law had been instituted to recover any part of said debt.

4. That on the 18th day of December, A. D. 1852, the said Anna H. Dickson took proceedings to foreclose said mortgage, under and by virtue of the power of sale therein contained, by advertisement under the statute in such case made and provided, and on that day inserted in "The Niles Republican," a newspaper printed, published, and circulated in said county of Berrien weekly, a notice of mortgage sale, as follows:

"*Mortgage Sale.*

"Default having been made in the payment of a sum secured by mortgage by Solyman Waterman to Anna H. Dixon, both of Niles,
in the State of Michigan, dated the eighth day of May, 1848,
54 and recorded in Book E of mortgages, in the office of the register of deeds of Berrien county, in said State, on the

eleventh day of May, 1849, at two and one fourth o'clock afternoon, on pages fifty-one and fifty-two, the premises described in said mortgage being lot number twenty-seven in that part of the village of Niles, in said county, laid out by William Justice, pursuant to a power of sale contained in said mortgage, and no suit or proceeding having been instituted at law to recover any part of the debt secured by said mortgage, the premises in said mortgage described will be sold at the court-house door, in Berrien county, at the village of Berrien, on the fifteenth day of March, 1853, between nine o'clock in the forenoon and the setting of the sun on that day. There is claimed to be due on said mortgage, at the date of this notice, the sum of six hundred and fifty-four dollars and fifty-four cents on bond in said mortgage mentioned, dated May 8th, 1849.

"Dec. 28th, 1852.

"ANNA H. DIXON, *Mortgagee.*"

That said notice was inserted in said paper and printed and published in said paper on said 18th day of December, also on the 25th day of December, A. D. 1852, and on the first day of January, A. D. 1853; and on the eighth day of January, A. D. 1853, said notice was published in said paper the same as previously, except that the spelling of the name "Dixon" signed to said notice was changed to "Dickson," and said notice so signed was published in said paper on said 8th day of January, A. D. 1853, and on the 15th and 22d days of January, A. D. 1853; that on the 29th day of January, 1853, the letters in the name "Dickson" signed to said notice became misplaced, so that the same read "Dickons," and said notice so signed was published in said paper on said 29th day of January and on the 5th, on the 12th, on the 19th, and on the 26th days of February, A. D. 1853, and on the 5th and 12th days of March, 1853.

55 5. That during the whole of the year 1853 Thomas Comins was sheriff of the county of Berrien and acted as such.

6. That on the 15th day of March, A. D. 1853, in pursuance of said notice, the said Thomas Comins, sheriff of Berrien county, exposed the premises described in said notice for sale at public vendue to the highest bidder at the front door of the court-house in the village of Berrien, that being the place of holding the circuit court for said county, pursuant to the statute in such case made and provided, and at said public vendue said premises were sold by said sheriff to Anna H. Dickson, the mortgagee, for the sum of six hundred and eighty-four dollars and eighty cents, that being the highest sum bid at said vendue, and she being the highest bidder thereat; that said Thomas Comins, sheriff as aforesaid, thereupon made, executed, and delivered to said purchaser a deed of said premises, and endorsed thereon the time when the same would become operative in case the premises were not redeemed according to law, and on the 24th day of March, A. D. 1853, deposited said deed with the register of deeds of Berrien county.

7. That said premises were not redeemed within the time limited by law for such redemption, and thereupon said deed became opera-

tive and was recorded in the office of the register of deeds for the county of Berrien, in Liber Z of Deeds on page 401, on the tenth day of May, A. D. 1855.

8. That thereupon and on or about the 15th day of May, A. D. 1855, the said Solyman Waterman surrendered the possession of said premises to said Anna H. Dickson, who went into possession thereof, and so continued until on or about April eleventh, 1855, when she sold and conveyed the same to Malcolm Crofoot by warranty deed, who went into possession thereof and so continued until on or about the 20th day of September, A. D. 1867, when he sold and conveyed the said premises, by warranty deed, to Edgar Reading, the
56 defendant in this suit, who went into possession thereof and so continued, and was in the quiet and peaceable possession thereof at the time of the commencement of this suit.

C. JEWETT,
Attorney for Plaintiff.
CHAMPLIN & MORE,
Attorneys for Defendant.

And thereupon said defendant rested his case.

And the said plaintiff, further to maintain and prove said issue on his part, then introduced and read in evidence the original notices of mortgage sale, referred to in said stipulation, as published in the Niles Republican, from the files of said paper, from which it appeared that in the publication on February 12th, 1853, the first one of the letters "e" in the word "mortgagee," following the name appended to the notice, had disappeared, and thereafter the said word was printed "mortgage." Said plaintiff also produced and read in evidence the original bond, a copy of which is hereto annexed, marked A, and the original mortgage, a copy of which is hereto annexed, marked B, both bearing date the 8th day of May, A. D. 1849; also the certificates endorsed on said mortgage; also the original sheriff's deed, a copy of which is hereto annexed, marked C, and all certificates endorsed thereon.

It was conceded by the parties, by their attorneys, on the trial of this cause that the decision by the court of the questions of law in this action would dispose of the case and leave nothing for the jury to do beyond rendering a verdict according to the direction of the court; also that nothing contained in the written statement of facts signed by C. Jewett and by Champlin & More should add to the effect of any original printed notice of mortgage sale or to the effect of the original bond and mortgage or to the effect of the original sheriff's deed or of any certificate thereon endorsed, but that such original documents should be received as they really were.

And thereupon the said plaintiff rested his case.

57 And the said counsel for the said defendant thereupon requested said court to charge said jury as follows:

1. It is a conceded fact in this case that the plaintiff was the owner in fee of the premises described in plaintiff's declaration on the 8th day of May, A. D. 1849.

2. That defendant was in possession of the premises at the time of bringing this suit.

3. It is also admitted that on the 8th day of May, 1849, Waterman executed a mortgage covering these premises to Anna H. Dickson; that it was recorded in the register's office of Berrien county, on the 11th day of May, 1849, in Liber E of Mortgages, on pages 51 and 52, and that it contained the usual power of sale, and was given to secure the payment to her of $1,400 and interest; that default had been made in the payment of the sum secured by this mortgage on the 18th day of December, A. D. 1852, and that she took steps to foreclose the same by advertisement, and on that day inserted a notice of sale in the Niles Republican, a newspaper printed, published, and circulated in Berrien county. The contents of this notice are admitted. The notice was published the requisite length of time, and was sufficient under the statutes of this State to authorize a sale of the mortgaged premises under the power of sale therein contained.

4. By the evidence in this case the sale was regular, and the premises were struck off to the said Anna H. Dickson, and a deed of the premises was executed by the sheriff to her, and the same was left with the register of deeds for the county of Berrien on the 24th day of March, 1853. The premises not having been redeemed within the time allowed by law, by virtue of the foreclosure under the power of sale and neglect to redeem, the title of Solyman Waterman became divested and rested in Anna H. Dickson.

5. Upon all the evidence in this case the defendant is entitled to recover, and your verdict should be for the defendant.

58 And the said circuit court did then and there refuse to charge said jury as requested by the counsel for the defendant in and by the third, fourth, and fifth paragraphs above stated.

To which refusal the said counsel for the defendant did then and there except.

And the said circuit judge, on the request of the counsel for said plaintiff, did then and there instruct said jury that the notice or advertisement of mortgage sale put in evidence in this case is insufficient.

To which charge and instruction the said counsel for defendant did then and there except.

And said circuit judge, on the request of counsel for said plaintiff, did then and there instruct and charge said jury that the title in fee to the premises described in the declaration did not pass by virtue of the statutory foreclosure proceedings.

To which instruction and charge the said counsel for the said defendant did then and there except.

And the said circuit judge did then and there also further declare and deliver his opinion to said jury that the facts in the case were presented under a stipulation upon which there is no dispute, and the only question presented here is only a question of law for the court, whether this foreclosure sale was sufficient to pass title, and the court instructs you that it was not sufficient to pass title; that it

did not come up to the requirements of the statute in such cases. That being the case, your verdict will be for the plaintiff.

To which instructions, as to the law of the case, the said defendant, by his counsel, did then and there except.

And the said circuit judge, under the charge and with the directions aforesaid, left the aforesaid issue and the evidence so given on the trial thereof as aforesaid to the said jury, and the jury aforesaid then and there gave their verdict for the said plaintiff, and
59 assessed his damages, on occasion of the premises, at six cents; and thereupon judgment was rendered upon said verdict for the plaintiff for his damages aforesaid and for the recovery of said premises; and, inasmuch as the said several matters so produced and given in evidence and the refusal to charge as aforesaid and the charge as given as aforesaid and the exceptions aforesaid do not appear by the record of the said trial and verdict, the counsel for the said defendant did then and there propose the aforesaid exceptions to the opinions of the said circuit judge and request him to sign this bill of exceptions, containing the several matters aforesaid, pursuant to the statute in such case made and provided; and thereupon the said circuit judge, at the request of the counsel for the defendant aforesaid, hath signed this bill of exceptions on the 14th day of December, one thousand eight hundred and eighty.

ANDREW J. SMITH,
Circuit Judge.

A.

Know all men by these presents that I, Solyman Waterman, of the village of Niles, in the county of Berrien, State of Michigan, am held and firmly bound unto Anna H. Dickson, of the same place, in the penal sum of three thousand dollars, to be paid to the said Anna H. Dickson, her heirs and assigns; to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal and dated the eighth day of May, in the year 1849.

The condition of this obligation is such that if the above-bounden Solyman Waterman, his heirs, executors, or administrators, shall well and truly pay to the said Anna H. Dickson, her heirs or assigns, the sum of fourteen hundred dollars in five equal annual instalments, payable on the twenty-ninth day of November of each year hereafter, together with interest, payable quarterly on the
60 twenty-ninth day of November, February, May, and August in each year, and said Waterman may at any time hereafter before the time of making said last payment make payment to said Anna H. Dickson of a bond and mortgage for any sum not exceeding the sum of one thousand dollars, well secured on real estate in said village of Niles, according to the terms and conditions of the agreement made between the parties on the twenty-ninth day of November, A. D. 1848, reference to which is hereby made, and the terms and conditions thereof are hereby adopted and made part of this bond, and on compliance by the said Waterman with the above

terms and conditions, then this bond to be void; otherwise to be and remain in full force.

SOLYMAN WATERMAN. [L. S.]

Signed, sealed, and delivered in presence of—
N. BACON.

Endorsed on back of A is the following:

Solyman Waterman to Anna H. Dickson. Bond, $1,400. Interest due 29 Feb'y, 1849. Paid. A. H. D., by C. K. G. Interest due 29th May, 1849. Paid. A. H. Dickson. Interest due 29th August, 1849. Paid. A. H. Dickson. Interest due 29th Nov., 1849. Paid. A. H. Dickson. Interest due 29th Feb'y, 1850. Paid. A. H. Dickson. Interest due 29th Aug., 1850. Paid. A. H. Dickson. Rec'd $26.60, int. due Aug. 29, '50. Anna H. Dickson. Rec'd 29 Oct., 1850, two hundred dollars on the within bond. Anna H. Dickson. Received the interest due Nov. 29, 1850. Anna H. Dickson. Rec'd the interest due Feb. 29, 1851. Anna H. Dickson. Received of Mr. Waterman 24.70 cts., interest due May 29th, 1851. Anna H. Dickson. Aug 29, 1851, received 24.70. A. H. Dickson. Nov. 29, 1851, received of Mr. Waterman 24.70. A. H. Dickson. Received the interest up to Feb'y 29, 1852. A. H. Dickson. Received the interest up to this date, Aug. 29, 1852. A. H. Dickson.

B.

This indenture, made this eighth day of May, in the year of our Lord one thousand eight hundred and forty-nine, between Solyman Waterman, of the village of Niles, in the county of Berrien, State of Michigan, of the first part, and Anna H. Dickson, of the same place, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of fourteen hundred dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents does grant, bargain, sell, remise, release, alien, and confirm, unto the said party of the second part and to her heirs and assigns forever all that certain piece or parcel of land situated, lying, and being in said village of Niles, known and described as lot number twenty-seven (27), in that part of said village which was laid out by William Justice; to have and to hold the above-bargained premises to the said party of the second part, her heirs and assigns, to
61 the sole and only proper use, benefit, and behoof of the said party of the second part, her heirs and assigns, forever: Provided always, That these presents are upon the express condition that if the said Solyman Waterman, his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid to the said party of the second part, her executors, administrators, or assigns, the just and full sum of fourteen hundred dollars, in five equal annual instalments, payable annually on the twenty-ninth day of November, together with interest, payable quarterly on the twenty-ninth day of February, May, August, and November of each year, and the

said Waterman may, at any time hereafter, before the time of making said last payment, make payment to said party of the second part of a bond and mortgage for any sum not exceeding one thousand dollars, well secured on real estate in said village of Niles, according to the terms and conditions of the agreement made between the parties on the twenty-ninth day of November, 1848, reference to which is hereby made, and the same in all its terms and conditions is adopted and made part of this mortgage, according to the condition of a certain bond or writing obligatory, bearing even date herewith, executed by Solyman Waterman, the said party of the first part, to the said party of the second part, as a collateral security, then these presents and the said bond or written obligatory shall cease and be null and void; but in case of non-payment of said sum of fourteen hundred dollars or of the interest or any part thereof at the above time limited for the payment thereof, then in such case it shall and may be lawful for the said party of the second part, her heirs, executors, administrators, or assigns, and the said party of the first part does hereby empower and authorize the said party of the second part, her heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises, or any part thereof, with the appurtenances, at public auction or vendue, and on such sale to make, execute to the purchaser or purchasers, his or their heirs and assigns, forever, good, ample,
62 and sufficient deed or deeds of conveyance in the law, pursuant to the statute in that case made and provided, rendering the surplus money (if any there should be) to the said party of the first part, his heirs, executors or administrators, after deducting the principal and interest moneys due as aforesaid and cost and charges of such vendue and sale aforesaid, and this mortgage is given for the purchase-money of said premises.

In witness whereof, the party of the first part hereunto sets his hand and seal the day and year first above written.

SOLYMAN WATERMAN. [L. S.]

Signed, sealed, and delivered in the presence of—
N. BACON.
C. K. GREEN.

STATE OF MICHIGAN, } ss:
Berrien County, }

On this eighth day of May, one thousand eight hundred and forty-nine, before me, a justice of the peace in and for said county, personally came the above-named Solyman Waterman, known to me to be the person who executed the foregoing instrument, and acknowledged the same to be his free act and deed.

GEORGE H. JEROME,
Justice of the Peace.

[Above endorsed as follows:] Solyman Waterman to Anna H. Dickson.

REGISTER'S OFFICE, BERRIEN CO., MICH.

Received for record in said office May 11th, 1849, at 2¼ hours p. m., and recorded in Book E of Mortgages on pages 51 and 52.

C.

63 This indenture, made this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and fifty-three, between Thomas Comins, sheriff Berrien county, in State of Michigan, of the first part, and Anna H. Dickson, of the second part, in the State of Michigan, witnessed:

Whereas at a sale made by the said party of the first part at the court-house, at the county seat of said county, on the fifteenth day of March, A. D. 1853, on the foreclosure of a certain mortgage made and executed by Solyman Waterman to Anna H. Dickson, both of Niles, in the State of Michigan, dated the eighth day of May, A. D. 1848, and recorded in Book E of Mortgages in the office of register of deeds of Berrien county, in said State, on the eleventh day of May, A. D. 1849, at two and one-fourth o'clock afternoon, on pages fifty-one and fifty-two, and said mortgaged premises being described as follows, to wit: Being lot number twenty-seven in that part of the village of Niles, in said county, laid out by William Justice; and whereas the said party of the second part has paid the full amount of the purchase-money for the same, six hundred and eighty-four dollars and eighty cents, to the said party of the first part, being the amount of the purchase-money thereof, and that being the highest sum bidden for the same:

Now, therefore, this indenture witnessed: That the said Thomas Comins, sheriff of the county of Berrien, in the State of Michigan, by virtue of the authority vested in him by the law of the said State, and in consideration of the premises and of the sum as aforesaid paid by the said party of the second part, the receipt whereof is hereby confessed, acknowledged, hath granted, bargained, and sold, and by these presents does grant, bargain, sell, convey unto the said party of the second part and *his* heirs and assigns forever the premises above described, with all and singular the rights, privileges, hereditaments, and appurtenances to the same belonging or in anywise appertaining; to have and to hold the same unto the said party of the second part and to *his* heirs and assigns forever;

64 and the said party of the first part does hereby covenant and agree to and with the said party of the second, *his* heirs and assigns, that in making the said sale — has in all things observed the rules and directions of the law.

In testimony whereof the said Thomas Comins, sheriff as aforesaid, has hereunto set his hand and seal the day and year first above written.

THOMAS COMINS,
Sheriff of Berrien County, Michigan.

In the presence of—
R. W. LANDON.
C. BRITAIN.

STATE OF MICHIGAN, } ss:
County of Berrien, }

On the 24th day of March, A. D. 1853, before me, a notary public in and for said county, personally came the above-named Thomas Comins, sheriff of said county, known to me to be the person who executed the foregoing instrument, and acknowledged the same to be his free act and deed.

RUFUS W. LANDON,
Notary Public, Berrien County, Michigan.

STATE OF MICHIGAN, } ss:
County of Berrien, }

I, William H. Marston, register of deeds in and for said county, do hereby certify that I have compared the annexed copy with the original instrument, as recorded in the records of Berrien county in Liber Z of Deeds, on page 401; and, further, that the same is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Berrien Springs, this 3d day of May, A. D. 1880.

[Seal Register of Deeds' Office, Berrien Co., Mich.]

WM. H. MARSTON,
Register of Deeds.

[Above endorsed as follows:] Anna H. Dickson *vs.* S. Waterman, Sheriff's deed on mortgage sale to Anna H. Dickson. This deed will become operative on the 15th day of March, A. D. 1844. Thomas Comins, sheriff of Berrien Co. Lot 27, Justice's, Niles. Filed March 25th, 1853, at 2 hours p. m. Chas. F. Howe, register. S. Waterman to Anna H. Dickson. Lot 27, Justice's, Niles.

65 REGISTER'S OFFICE, BERRIEN CO., MICH.

Received for record May 10th, 1855, at 8 hours a. m., and recorded in Book Z of Deeds on pages 401 and 402.

WARREN CHAPMAN, *Register.*

STATE OF MICHIGAN, } ss:
County of Kent, }

John E. More, being duly sworn, says that on the thirtieth day of November, A. D. 1880, he served a copy of the annexed bill of exceptions and the annexed notice thereto attached on David Bacon, as attorney for Lydia A. Bacon, by depositing the same in the post office at Grand Rapids, Michigan, enclosed in an envelope, postage fully prepaid, addressed to said David Bacon at Niles, Michigan, that being the residence of said David Bacon.

JOHN E. MORE.

Sworn and subscribed before me this 2d day of December, A. D. 1880.

W. J. STEWART,
Notary Public, Kent County, Mich.

STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

EDGAR READING *ads.* SOLYMAN WATERMAN.

To David Bacon, Esq., attorney for Lydia A. Bacon:

Take notice that the bill of exceptions in the above-entitled cause, a copy of which is hereto attached, will be presented to Hon. A. J. Smith, circuit judge of said county, for settlement at his
66 chambers in Cassopolis, on the 14th day of December, A. D. 1880, at ten o'clock a. m., or as soon thereafter as counsel can be heard.

Very truly, &c., CHAMPLIN & MORE,
Attorneys for Defendant.

Dated Nov. 30th, 1880.

STATE OF MICHIGAN, } *ss:*
County of Kent, }

John E. More, being duly sworn, says that on the thirteenth day of November, A. D. 1880, he served a copy of the annexed bill of exceptions and the annexed notice thereto attached on Charles Jewett, the attorney of record for the plaintiff in the within-entitled cause, by depositing the same in the post office at Grand Rapids, Michigan, enclosed in an envelope, postage fully prepaid, addressed to said Charles Jewett at Niles, Michigan, that being the residence of said Charles Jewett.

JOHN E. MORE.

Sworn and subscribed before me this 2d day of December, A. D. 1880.

W. J. STUART,
Notary Public, Kent County, Mich.

STATE OF MICHIGAN:

The Circuit Court for the County of Berrien.

EDGAR READING *ads.* SOLYMAN WATERMAN.

To Charles Jewett, Esq., attorney for plaintiff:

Take notice that the bill of exceptions in the above-entitled
67 cause, a copy of which is hereto attached, will be presented to Hon. A. J. Smith, circuit judge of said county, for settlement at his chambers in Cassopolis, on the 14th day of December, A. D. 1880, at ten o'clock a. m., or as soon thereafter as counsel can be heard.

Very truly, &c., CHAMPLIN & MORE,
Attorneys for Defendant.

Dated Nov. 30th, 1880.

68 The foregoing bill of exceptions endorsed as follows: State of Michigan. The circuit court for the county of Berrien. Edgar Reading *ads.* Solyman Waterman. Bill of exceptions and

proof of service of notice of settlement. Filed Dec. 22, 1880. E. D. Cooke, clerk. Champlin & More, def't's att'ys.

69 The People of the State of Michigan to the judge — our circuit court in and for the county of Berrien, Greeting:

Because in the record and proceedings and also in the giving of judgment in a plaint which was in our circuit court, before you, between Solyman Waterman, plaintiff, and Edgar Reading, defendant, in a plea of ejectment, manifest error hath intervened to the great damage of the said def't, as by his complaint we are informed, we, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you that, if judgment be thereupon given, then you send to our justices of our supreme court of jurisdiction, distinctly and openly, upon your seal, the record and proceedings of the plaint aforesaid, with all things concerning the same and this writ, so that they may have them at the court-house, in the city of Lansing, on the eighteenth day of January next, that, the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of Michigan ought to be done.

Witness the Honorable Isaac Marston, chief justice of our supreme court, at Lansing, this twenty-fourth day of December, in the
70 year of our Lord one thousand eight hundred and eighty.

CLAUDE C. WALKER,
Clerk of the Supreme Court.
ED. W. LOWE, *Deputy Clerk.*

To the supreme court of the State of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

December 31st, 1880.

EDWIN D. COOKE, *Clerk.*

STATE OF MICHIGAN, *ss:*

In the Supreme Court.

CLERK'S OFFICE.

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed is a true and correct copy of the return to the writ of error now on file in said court in said cause; that I have compared the same with the original and that it is a true transcript therefrom and the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this eighth day of February, A. D. 1882.

[SEAL.] CHAS. C. HOPKINS, *Clerk.*

71 [Endorsed:] No. 5528. Supreme court of the State of Michigan. Edgar Reading, pl'ff in error, *vs.* Solyman Water-

man, def't in error. Writ of error. Filed in the supreme court Jan'y 12, 1881. Ed. W. Lowe, dp. clerk. Champlin & More, att'y-for pl'ff in error. Filed May 25, 1883. H. M. Hinsdill, clerk.

72 EDGAR READING, Plaintiff in Error,

vs.

SOLYMAN WATERMAN, Defendant in Error.

Afterwards, to wit, on the 18th day of January, A. D. 1881, before the justices of the supreme court of the State of Michigan, at the capitol, in the city of Lansing, comes the said Edgar Reading, by Champlin & More, his attorneys, and says that in the record and proceedings aforesaid and also in the giving of the judgment aforesaid there is manifest error in this, to wit:

1. That by the record aforesaid it appears that the said circuit judge refused to charge said jury as requested by the counsel of said defendant as follows: "It is also admitted that on the 8th day of May, 1849, Waterman executed a mortgage covering these premises to Anna H. Dickson; that it was recorded in the register's office of Berrien county on the 11th day of May, 1849, in Liber E of
73 Mortgages, on pages 51 and 52, and that it contained the usual power of sale and was given to secure the payment to her of $1,400 and interest; that default had been made in the payment of the sum secured by this mortgage on the 18th day of December, A. D. 1852, and that she took steps to foreclose the same by advertisement, and on that day inserted a notice of sale in the Niles Republican, a newspaper printed, published, and circulated in Berrien county. The contents of this notice are admitted. The notice was published the requisite length of time and was sufficient under the statutes of this State to authorize a sale of the mortgaged premises under the power of sale therein contained."

2. That by the record and proceedings aforesaid it appears that the said circuit judge refused to charge said jury as requested by the counsel of said defendant, as follows: "By the evidence in this case the sale was regular and the premises were struck off to the said Anna H. Dickson, and a deed of the premises was executed by the sheriff to her, and the same was left with the register of deeds for the county of Berrien on the 24th day of March, 1853. The premises not having been redeemed within the time allowed by law, by virtue of the foreclosure under the power of sale and neglect to redeem the title of Solyman Waterman became divested and vested in Anna H. Dickson."

3. That by the records and proceedings aforesaid it appears that the said circuit judge refused to charge said jury as requested by the said counsel for the defendant as follows: "Upon all the evidence in this case the defendant is entitled to recover and your verdict should be for the defendant."

4. That by the records and proceedings aforesaid the said circuit judge charged said jury as requested by said plaintiff as follows: "The notice or advertisement of mortgage sale put in evidence in this case is insufficient."

5. That by the records and proceedings aforesaid the said circuit judge charged said jury as requested by said plaintiff's counsel as follows: "The title in fee to the premises described in the declaration did not pass by virtue of the statutory foreclosure proceedings."

6. That by the records and proceedings aforesaid it appears that the said circuit judge charged said jury that the foreclosure sale was not sufficient to pass title; that it did not come up to the requirements of the statute in such cases; that being the case, your verdict will be for the plaintiff.

Wherefore this defendant prays that the judgment aforesaid, for the errors aforesaid, may be revoked, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the judgment aforesaid, &c.

CHAMPLIN & MORE,
Attorneys for Plaintiff in Error.

74 STATE OF MICHIGAN, *ss:*

In the Supreme Court.

CLERK'S OFFICE.

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed is a true and correct copy of the assignment of errors now on file in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom and the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this eighth day of February, A. D. 1882.

[SEAL.] CHAS. C. HOPKINS, *Clerk.*

75 [Endorsed:] 5528. Supreme court. Edgar Reading, pl'ff in error, *vs.* Solyman Waterman, def't in error. Assignment of errors. Filed Jan. 12, '81. Edw. Lowe, clerk. Champlin & More, att'ys for pl'ff in error.

76 DEF'T'S EXHIBIT No. 1. May 25, '83. H. M. H., cl'k.

This indenture, made the sixteenth day of October, in the year of our Lord one thousand eight hundred and eighty, between Solymon Waterman, of the county of Yolo and State of California, party of the first part, and Lydia A. Bacon, of the city of Niles and State of Michigan, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of three hundred dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, does by these presents grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to her heirs and assigns forever all that certain piece or parcel of land lying and being in the county of Berrien and State of Michigan, known and described as lot No. twenty-seven (27), in William Justice's plat of the village (now city) of Niles, together with all and singular the hereditaments

and appurtenances thereunto belonging or in anywise appertaining; to have and to hold the said premises to the said party of the second part and to her heirs and assigns to the sole and only proper use, benefit, and behoof of the said party of the second part, her heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

S. WATERMAN. [L. S.]

Signed, sealed, and delivered in presence of—
C. S. FROST.
CHAS. R. HOPPIN.

77 STATE OF CALIFORNIA, } ss:
County of Yolo, }

On this sixteenth day of October, one thousand eight hundred and eighty, before me, C. S. Frost, a notary public in and for said county, personally came the above-named Solymon Waterman, known to me to be the person who executed the foregoing instrument, and acknowledged the same to be his free act and deed.

C. S. FROST, [SEAL.]
Notary Public.

STATE OF CALIFORNIA, *County of Yolo:*

I, J. K. Smith, county clerk and *ex officio* clerk of the superior court in and for said county, do hereby certify that C. S. Frost, whose name is subscribed to the annexed certificate of acknowledgment, was at the date of the same and now is a notary public in and for said Yolo county, duly qualified and authorized by law to take acknowledgments, and full faith and credit are due to all his official acts as such; and I do further certify that the signature attached to the annexed certificate is genuine, and that his attestations are in due form of law.

[SEAL.]

J. K. SMITH,
County Clerk of Yolo County, Cal.

Liber 66 of Deeds, page 7.

Received for record the 27th day of October, A. D. 1880, at 12 o'clock m.

WM. H. MARSTON, *Register.*

78 STATE OF MICHIGAN, } ss:
County of Berrien, }

I, Edwin R. Havens, register of deeds in and for the county of Berrien and State of Michigan, do hereby certify that I have compared the copy of quitclaim deed to which this is attached with the original record of said quitclaim deed, recorded in Liber 66 of Deeds on page 7, in my office, and have found the same to be a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed

the seal of said office, at Berrien Springs, this 21 day of May, A. D. 1883.

[SEAL.] ED. R. HAVENS,
Register of Deeds.
By W. P. HARMAN, *Deputy.*

[Endorsed:] No. 1666. Quitclaim deed. Filed May 25, 1883. H. M. Hinsdill, cl'k.

79 DEF'T'S EXHIBIT No. 2. H. M. H., Cl'k.

This indenture, made the eighth day of May, in the year of our Lord one thousand eight hundred and forty-nine, between Solyman Waterman, of the village of Niles, in the county of Berrien, State of Michigan, of the first part, and Anna H. Dickson, of the same place, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of fourteen hundred dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents does grant, bargain, sell, remise, release, alien, and confirm, unto the said party of the second part and to her heirs and assigns forever all that certain piece or parcel of land, situate, lying, and being in said village of Niles, known and described as lot number twenty-seven (27) in that part of said village which was laid out by William Justice; to have and to hold the above-bargained premises to the said party of the second part, her heirs and assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, her heirs and assigns, forever:

Provided always, and these presents are upon this express condition, That if the said Solyman Waterman, his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid to the said party of the second part, her executors, adminis-
80 trators, or assigns, the just and full sum of fourteen hundred dollars in five equal annual instalments, payable annually on the twenty-ninth day of November, together with interest, payable quarterly on the twenty-ninth day of February, May, August, and November of each year; and the said Waterman may, at any time hereafter before the time of making said last payment, make payment to said party of the second part of a bond and mortgage for any sum not exceeding one thousand dollars, well secured on real estate in said village of Niles, according to the terms and conditions of the agreement made between the parties on the twenty-ninth day of November, 1848, reference to which is hereby made, and the same in all its terms and conditions is adopted and made part of this mortgage, according to the condition of a certain bond or writing obligatory, bearing even date herewith, executed by Solyman Waterman, the said party of the first part, to the said party of the second part as a collateral security, then these presents and the said bond or writing obligatory shall cease and be null and void; but in case of non-payment of the said sum of fourteen hundred dollars or of the interest thereof or any part thereof at the above time limited for

the payment thereof, then and in such case it shall and may be lawful for the said party of the second part, her heirs, executors, administrators, or assigns, and the said party of the first part do hereby empower and authorize the said party of the second
81 part, her heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises or any part thereof, with the appurtenances, at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, his or their heirs and assigns, forever, good, ample, and sufficient deed or deeds of conveyance in the law, pursuant to the statute in that case made and provided, rendering the surplus moneys (if any there should be) to the said party of the first part, his heirs, executors, or administrators, after deducting the principal and interest moneys due as aforesaid and the cost and charges of such vendue and sale aforesaid, and this mortgage is given for the purchase-money of said premises.

In witness whereof the party of the first part has hereunto set his hand and seal the day and year first above written.

SOLYMAN WATERMAN. [L. S.]

Signed, sealed, and delivered in presence of—
N. BACON.
C. K. GREEN.

STATE OF MICHIGAN, } ss:
Berrien County, }

On this eighth day of May, one thousand eight hundred and
82 forty-nine, before me, a justice of the peace in & for said county, personally came the before-named Solyman Waterman, known to me to be the person who executed the foregoing instrument, and acknowledged the same to be his free act and deed.

GEORGE H. JEROME,
Justice of the Peace.

[Endorsed:] No. 1666. Solyman Waterman to Anna H. Dickson. Mortgage, $1,400. Lot 27, W. Justice's, Niles. Register's office, Berrien Co., Mich. Rec'd for record in said office May 11, 1849, at 2¼ hours p. m., and recorded in Book E of Mortgages, on pages 51 & 52. C. F. Howe, register. Filed May 25, 1883. H. M. Hinsdill, clerk.

83 DEF'T'S EXHIBIT No. 3. H. M. H., Cl'k.

Know all men by these presents that I, Solyman Waterman, of the village of Niles, in the county of Berrien, State of Michigan, am held and firmly bound unto Anna H. Dickson, of the same place, in the penal sum of three thousand dollars, to be paid to the said Anna H. Dickson, her heirs and assigns; to which payment, well and truly to be paid, I bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal and dated the eighth day of May, in the year 1849.

The condition of this obligation is such that if the above-bounden Solyman Waterman, his heirs, executors, or administrators, shall well and truly pay to the said Anna H. Dickson, her heirs or assigns, the sum of fourteen hundred dollars in five equal annual instalments, payable on the twenty-ninth day of November of each year hereafter, together with interest, payable quarterly, on the twenty-ninth day of November, February, May, and August in each year; and said Waterman may, at any time hereafter before the time of making said last payment, make payment to said Anna H. Dickson of a bond and mortgage for any sum not exceeding the sum of one thousand dollars, well secured on real estate in said village of Niles, according to the terms and conditions of the agreement made between the parties on the twenty-ninth day of November, A. D. 1848, reference to which is hereby made, and the terms and conditions thereof are hereby adopted and made part of this bond, and
84 on compliance by the said Waterman with the above terms and conditions, then this bond to be void; otherwise to be and remain in full force.

SOLYMAN WATERMAN. [L. S.]

Signed, sealed, and delivered in presence of—
N. BACON.

[Endorsed:] Solyman Waterman to Anna H. Dickson. Bond, $1,400. Interest due 29th Feb'y, 1849. Paid. A. H. D., by C. K. G. Interest due 29th of May, 1849. Paid. A. H. Dickson. Interest due 29 of August, 1849. Paid. A. H. Dickson. Interest due 29 November, 1849. Paid. A. H. Dickson. Interest due Feb. 29, 1850. Paid. A. H. Dickson. Interest due 29 May, 1850. Paid. A. H. Dickson. Rec'd $26.50, the interest due Aug. 29, '50. Anna H. Dickson. Rec'd, 29th Oct., 1850, two hundred dollars on the within bond. Anna H. Dickson. Received the interest due Nov. 29, 1850. Anna H. Dickson. Received the interest due Feb. 29, 1851. Anna H. Dickson. Received of Mr. Waterman 24.70 cts., interest due May 29, 1851. A. H. Dickson. Aug. 29, 1851, received 24.70. A. H. Dickson. Nov. 29, 1851, received of Mr. Waterman 24.70. A. H. Dickson. Received the interest up to Feb. 29, 1852. Anna H. Dickson. Received the interest up to this date, Aug. 29, 1852. A. H. Dickson. Filed May 25, 1883. H. M. Hinsdill, clerk.

85 Ex. No. 4. H. M. H., Cl'k.

This indenture, made this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and fifty-three, between Thomas Comins, sheriff Berrien county, in the State of Michigan, of the first part, and Anna H. Dickson, of the second part, in the State of Michigan, witnessed:

Whereas at a sale made by the said party of the first part at the court-house, at the county seat of said county, on the fifteenth day of March, A. D. 1853, on the foreclosure of a certain mortgage, made and executed by Solyman Waterman to Anna H. Dickson, both of Niles, in the State of Michigan, dated the eighth day of

May, A. D. 1848, and recorded in Book E of Mortgages in the office of register of deeds of Berrien county, in said State, on the eleventh day of May, A. D. 1849, at two and one-fourth o'clock afternoon, on pages fifty-one and fifty-two, and said mortgaged premises being described as follows, to wit, being lot number twenty-seven in that part of the village of Niles, in said county, laid out by William Justice; and whereas the said party of the second part has paid the full amount of the purchase-money for the same, six hundred and eighty-four dollars and eighty cents, to the said party of the first part, being the amount of the purchase-money thereof, and that being the highest sum bidden for the same:

Now, therefore, this indenture witnesses: That the said Thomas Comins, sheriff of the county of Berrien, in the State of Michigan, by virtue of the authority vested in him *by virtue of the au-*
86 *thority vested in him* by the law of the said State and in consideration of the premises and of the sum as aforesaid paid by the said party of the second part, the receipt whereof is hereby confessed, acknowledged, hath granted, bargained, and sold, and by these presents does grant, bargain, sell, convey, unto the said party of the second part and *his* heirs and assigns forever the premises above described, with all and singular the right, privilege, hereditaments, and appurtenances to the same belonging or in anywise appertaining; to have and to hold the same unto the said party of the second part and *his* heirs and assigns forever, and the said party of the first part does hereby covenant and agree to and with said party of the second part *his* heirs and assigns, that in making the said *sail* — has in all things observed the rules and directions of the law.

In testimony wher-of the said Thomas Comins, sheriff as aforesaid, has hereunto set his hand and seal the day and year first above written.

THOMAS COMINS,
Sheriff of Berrien County, Michigan.

In the presence of—
R. W. LANDON.
C. BRITAIN.

STATE OF MICHIGAN, } *ss:*
County of Berrien, }

On the 24th day of March, A. D. 1853, before me, a notary
87 public in and for said county, personally came the above-named Thomas Comins, sheriff of said county, known to me to be the person who executed the foregoing instrument, and acknowledged the same to be his free act and deed.

RUFUS W. LANDON,
Notary Public, Berrien County, Michigan.

[Endorsed:] S. Waterman (by sh'ff) to Ann H. Dickson. Lot 27, Justice's, Niles. Register's office, Berrien Co., Mich. Rec'd for record May 10, 1855, at 8 hours a. m. & recorded in Book Z of Deeds, on pages 401 & 402. Warren Chapman, register.

[Endorsed:] No. 1666. Anna H. Dickson *vs.* S. Waterman.

Sheriff's deed on mortgage sale to Anna H. Dickson. This deed will become opperative on the 15th day of March, A. D. 1866. Thomas Comins, sheriff of Berrien Co. Lot 27, Justice's, Niles. Filed March 25, 1853, at ? hours p. m. Chas. F. Howe, register. Filed May 25, '83. H. M. Hinsdill, cl'k.

88 It is hereby agreed between David Bacon, agent, of the city of Niles, Michigan, of the first part, and Francis M. Ives, of the city of Niles & State of Michigan, of the second part, as follows: The said David Bacon, in consideration of the rents and covenants herein specified, do- hereby let and lease to the said Francis M. Ives lot No. twenty-seven (27), William Justice's platt of the village, for the term of one — from and after the 17th day of July, 1879, on the terms and conditions hereinafter mentioned:

Provided, That in case any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said David Bacon or his certain attorney to re-enter into and repossess the said premises and the said party of the second part and each and every other occupant to remove and put out; and the said Francis M. does hereby hire the said premises by the month as aboye mentioned, and does covenant and promise to pay to the said David Bacon, agent, the monthly rent of one dollar per month, and in taking care & charge of the premises aforesaid, being the west 66 feet of the property known as the Reading House.

Witness our hands and seals this 18th day of July, 1879.

DAVID BACON, *Agent.*
FRANCIS M. IVES.

89 [Endorsed:] No. 1666. Lease. David Bacon, agent, to Francis M. Ives. Ex. No. 5. H. M. H., cl'k. Filed May 25, 1883. H. M. Hinsdill, cl'k.

90 SOLYMAN WATERMAN *vs.* EDGAR READING.

Ejectment.

Before Judge Smith & jury.

NOVEMBER 8TH, 1880.

Appearances: For plaintiff, E. Bacon; for defendant, J. Champlin.

Plaintiff offers in evidence a deed recorded in Liber R of Deeds of the register's office of Berrien county, on page 614; grantor, Anna H. Dickson; grantee, Solyman Waterman; dated May 8th, 1849; recorded May 11th, 1849.

DAVID BACON, a witness sworn for the plaintiff.

Direct examination by Mr. BACON:

Q. Where do you reside?
A. In Niles.
Q. In this county?
A. Yes, sir.

Q. About how long have you resided within a few miles of that place or at that place?

A. I have resided in Niles permanently since 1852 & in Cass county since 1835.

Q. Since what time?

A. Since 1835.

Q. About what distance from Niles was your home in Cass county?

A. Ten miles.

Q. What is your present age?

A. 52.

Q. State whether you were frequently in Niles in the year 1850.

A. Yes, sir.

Q. State whether you had relatives living there.

A. Uncle & cousins.

Q. State whether that was the market place where most of the business was done from your home.

91 A. It was the market place almost entirely for the whole of that country.

Q. State whether you know Solyman Waterman.

A. Yes, sir.

Q. State whether you know him in the summer of 1850.

A. Yes, sir.

Q. State whether you knew this lot 27.

A. Yes, sir.

Q. State where Solyman Waterman lived in 1850, & what he was doing.

A. He was keeping the old hotel that was known as the Old Diggins on lot 27; it was an old frame hotel; I think it was the first hotel in Niles.

Q. State whether he was in possession of this lot.

A. Yes, sir; he was there keeping hotel at that time.

Q. State whether he continued so for some time.

A. He continued there until the spring of 1851, when he rented it to Mr. Rounds, who kept it until 1854 as a hotel.

Q. While Waterman was there do you know whether he was claiming as owner?

A. Waterman claimed as owner & purchaser from Mrs. Dickson

Q. State whether you knew Edgar Reading.

A. I did.

Q. State who was in possession of this lot and occupying it in the spring of 1868 and for some years thereafter.

A. Dr. Reading.

Q. Edgar Reading?

A. Yes, sir.

Q. Defendant in this suit?

A. Yes, sir; Dr. Reading bought it, I know, in 1867; suit was commenced in 1868.

Q. Dr. Reading was then in possession?

A. Yes, sir.

92 Q. Of this lot 27?

A. Yes, sir.

Q. State whether Dr. Reading continued in possession from the spring throughout the year 1868.

A. Oh, yes; he built his hotel there in 1868; he was in possession for a number of years afterwards.

Cross-examination by Mr. CHAMPLIN:

Q. You say he built a hotel on that property?

A. Yes, sir; he commenced it in the spring of 1868?

Q. Did he complete it?

A. He completed it that & the ensueing year.

Mr. BACON: This is objected to as any evidence of improvement.

Mr. CHAMPLIN: It is not asked for that purpose.

Q. When do you say that Edgar Reading went into possession of these premises?

A. He bought them in the fall of 1867; he tore down the old hotel during the winter.

Q. Who was in possession immediately prior to him?

A. Malcolm Crofoot was the owner of it; I think he was keeping hotel at the time.

Mr. BACON: Do you mean owner?

A. He was the man in possession.

Q. He claimed to be the owner?

A. Yes, sir.

Mr. CHAMPLIN: Who did Crofoot get it from?

A. Anna H. Dickson.

Q. Do you know how these parties claimed to be in possession that you have mentioned; first let me ask who it was leased
93 to from 1851?

A. '51 to '54 it was leased to Henry Rounds.

Q. Do you know how he claimed to get possession?

A. Yes, sir.

Q. How?

A. Henry Rounds rented of Solyman Waterman.

Q. How did Mrs. Dickson get possession?

A. What I know of that is by the records.

Q. Crofoot went in under her, you say?

A. Yes, sir; in 1855.

Q. Did she claim to foreclose some mortgage?

A. The records show that I never had any conversation with her, but that was the general understanding that she foreclosed the mortgage.

Q. Are you a married man?

A. Yes, sir.

Q. What is your wife's name?

A. Lydia A. Bacon.

Q. Are you or she related to Waterman?

A. No, sir.

Q. Do you know where Waterman lives now?

A. Yes, sir.

Q. Is he living?

A. He is.
Q. Where does he live?
A. He was on the 17th of Oct.—he lives in California.
Q. Ever have any correspondence with him?
A. No, sir; not directly.
Q. Have you indirectly?
A. Yes, sir.
Q. Did you negotiate for the purchase of this property?
A. Yes, sir.

Mr. BACON: I object to it as evidence of any transfer after the commencement of suit.

COURT: It is to show the interest of the witness in the premises, I suppose.

Q. Have you negotiated for the purchase of this property?
A. Yes, sir.
94 Q. What is that property worth now?
A. Well, I can hardly tell you, but it cost a great deal of money.
Q. Can you tell about what it cost?
A. Dr. Reading claimed that the whole property on this lot & the other lot cost him 70 thousand dollars.
Q. Is that half of it?
A. This takes one-half—there is two lots—this takes one.
Q. What would be your judgment of the value of this property?
A. Well, sir, in the condition it is now this lot ought to be worth $15,000—from 12 to 15 thousand.
Q. Did you negotiate for the purchase of this property from Waterman?
A. Yes, sir.
Q. Did you pay any consideration?
A. Yes, sir.
Q. Did you pay the consideration named in the deed?
A. Yes, sir.
Q. Three hundred dollars?
A. Yes, sir; about five hundred is what it cost me; three hundred is what I paid him.
Q. Who did you have it conveyed to?
A. Lydia A. Bacon.
Q. That is your wife?
A. Yes, sir.
Q. Did you have any title before this deed?
A. Only by agreement with Mr. Waterman.
Q. Did you have a written agreement with him?
A. Not with him, but with Charles Hoppin in California.
Q. Who is he?
A. He is a gentleman that lives in California.
Q. What place?
95 A. He lives in Yolo county near Yolo.
Q. Is that where Waterman lives?

A. Waterman makes his home with this Hoppin, except when he is with his children in San Francisco.

Q. Were you personally acquainted with Hoppin?

A. Yes, sir.

Q. Did he go from this section?

A. Yes, sir.

Q. Where?

A. Niles.

Q. He lived at Niles?

A. Yes, sir.

Q. Is he one of the witnesses to that deed?

A. Yes, sir.

Redirect examination by Mr. BACON:

Q. When you speak of this property being worth $15,000, state whether you include the buildings.

A. As it stands to-day there are three 20-foot stores. I should think it was worth from 12 to 15 thousand.

Q. What would be the fair value of the lot if there was no building there?

A. With the old building that was on it?

Q. No; take it without any buildings.

A. I should think it would be worth from 5 to 6 thousand dollars.

Q. What would be your judgment that it would be worth with the old building as it stood when Reading purchased?

A. I should say, with the old building, to-day it ought to be worth $6,000—half of it; the building, as it stands now, is impracticable for any use; it cost a great deal of money; a building that
96 cost a quarter of that would be worth absolutely just as much money.

Q. That is, the present building on it?

A. Yes, sir.

Q. I ask you with the old building?

A. I think it ought to be worth $6,000.

Q. State whether this old building amounted to much of anything.

A. It was a frame hotel; it was torn down at the building of the present hotel. I think the old building was worth $1,000.

Q. What would the naked lot be worth to-day?

A. It ought to be worth from 4 to 5 thousand dollars; it is 66 feet front. I don't suppose it could be bought for less than that.

Q. Less than what?

A. It ought to be worth 100 dollars a foot. I should say it was, well, worth from 4 to 5 thousand dollars. Property sold 2 years ago just above there for $200 a foot.

Q. You have been inquired of on your cross-examination as to Mrs. Dickson getting this property under a mortgage foreclosure as against whom?

A. Mr. Solyman Waterman.

Q. State whether it was supposed to be the purchase-money?

A. I suppose so; of course I know nothing about that, only what the records show.

Recross-examination by Mr. CHAMPLIN:

Q. Where do you reside?
A. In Niles.
Q. Whereabout in Niles?
97 A. On the corner of 5th & Main, nearly opposite Pike's Hotel.
Q. You do not live in that hotel?
A. No, sir.
Q. Are you the agent of your wife?
A. Yes, sir.
Q. Have you possession of that hotel property?
A. I am having an office in there.
Q. Have you possession?
A. Yes, sir. My office is there & has been for six months.

Mr. BACON: How long did you say you had had possession of it as agent for your wife?

A. I have been there six months. There has been another party there over a year.
Q. Was he under your direction?
A. Yes, sir.

Mr. CHAMPLIN: Tell me when you went into possession.

A. I cannot tell you exactly; I think it was in the summer of 1878.
—. Tell me by what arrangement you got into possession.
A. After making this agreement with Mr. Waterman & paying him half of the money.
Q. What?
A. After having made this agreement with Mr. Waterman & paying him half of the money, then I went into possession. I think that was along in the summer or spring of 1878.
Q. How did he get in?
A. Who?
Q. Waterman was not in possession?
A. No, sir.
Q. Who was?
A. It was vacant.
Q. Who left it to make it vacant?
A. Nobody that I know of.
Q. Didn't Reading have possession there?
98 A. No, sir.
Q. When did the occupant leave it?
A. Let me see, I think the occupant left it in the fall of 1877.
Q. And the building remained vacant?
A. Yes, sir.
Q. No one in possession?
A. No, sir; not for a long —. There was two or three mortgages being foreclosed. The last occupant was a hotel-keeper.
Q. What was his name?
A. Charles Hilton, I believe, was the last one. I think he went out in 1877.
Q. Did you have any arrangement with him by which he gave up possession to you?

A. No, sir; never had any conversation with him.
Q. Left open & unlocked?
A. It was open there for months.

Mr. CHAMPLIN: I offer the stipulation of facts in evidence, signed by the attorneys in this case. I offer in evidence, Liber 66, page 7, a deed from Solyman Waterman to Lydia A. Bacon, dated October 16th, 1880, recorded October 27th, 1880, of the premises in question.

Mr. BACON: That is objected to; it is a deed since the commencement of suit, & therefore inadmissible.

Mr. BACON: The notices mentioned in the stipulation are offered in evidence. I will put in evidence the original bond, the original mortgage, & the original sheriff's deed, with all of the certificates.

99 Stipulation marked Exhibit 1; mortgage marked Ex. 2; sheriff's deed marked Ex. 3; bond marked Ex. 4.

Charge to the Jury.

Requests for the plaintiff & defendant read by the court.

GENTLEMEN OF THE JURY:

The facts in this case were presented under a stipulation to you upon which there is no dispute, & the only question presented here is purely a question of law for the court whether this foreclosure sale was sufficient to pass title, & the court instructs you that it was not sufficient to pass title; that it did not come up to the requirements of the statute in such cases, & that being the case your verdict will be for the plaintiff. You need not leave your seats unless you wish to; you can confer with each other & render your decision.

Defendant excepts to the refusal of the court to give the 3rd, 4th, & 5th requests asked by the defendant.

Defendant excepts to the giving of the 1st & 2nd request as asked by the plaintiff.

Defendant excepts to the oral instructions of the court upon the insufficiency of the notice of sale under the foreclosure by advertisement.

100 [Endorsed:] No. 1666. Filed May 25, 1883. H. M. Hinsdill, cl'k.

101 PL'FF'S EXHIBIT No. 3. H. M. H., Cl'k. May 25th, 1883.

Supreme Court.

EDGAR READING *vs.* SOLYMAN WATERMAN.

Waterman in August, 1868, began an *an* action of ejectment against Reading, who was in possession, as purchaser under mesne conveyances from Anna H. Dickson, of lot 27 in William Justice's plat of Niles, to recover that lot, on which Reading had begun and nearly completed very expensive improvements.

It appears from the record that Waterman, in May, 1849, bought this land of Anna H. Dickson and gave back a purchase-money

May, A. D. 1848, and recorded in Book E of Mortgages in the office of register of deeds of Berrien county, in said State, on the eleventh day of May, A. D. 1849, at two and one-fourth o'clock afternoon, on pages fifty-one and fifty-two, and said mortgaged premises being described as follows, to wit, being lot number twenty-seven in that part of the village of Niles, in said county, laid out by William Justice; and whereas the said party of the second part has paid the full amount of the purchase-money for the same, six hundred and eighty-four dollars and eighty cents, to the said party of the first part, being the amount of the purchase-money thereof, and that being the highest sum bidden for the same:

Now, therefore, this indenture witnesses: That the said Thomas Comins, sheriff of the county of Berrien, in the State of Michigan,
86 by virtue of the authority vested in him *by virtue of the authority vested in him* by the law of the said State and in consideration of the premises and of the sum as aforesaid paid by the said party of the second part, the receipt whereof is hereby confessed, acknowledged, hath granted, bargained, and sold, and by these presents does grant, bargain, sell, convey, unto the said party of the second part and *his* heirs and assigns forever the premises above described, with all and singular the right, privilege, hereditaments, and appurtenances to the same belonging or in anywise appertaining; to have and to hold the same unto the said party of the second part and *his* heirs and assigns forever, and the said party of the first part does hereby covenant and agree to and with said party of the second part *his* heirs and assigns, that in making the said *sail* — has in all things observed the rules and directions of the law.

In testimony wher-of the said Thomas Comins, sheriff as aforesaid, has hereunto set his hand and seal the day and year first above written.

THOMAS COMINS,
Sheriff of Berrien County, Michigan.

In the presence of—
R. W. LANDON.
C. BRITAIN.

STATE OF MICHIGAN, } *ss:*
County of Berrien, }

87 On the 24th day of March, A. D. 1853, before me, a notary public in and for said county, personally came the above-named Thomas Comins, sheriff of said county, known to me to be the person who executed the foregoing instrument, and acknowledged the same to be his free act and deed.

RUFUS W. LANDON,
Notary Public, Berrien County, Michigan.

[Endorsed:] S. Waterman (by sh'ff) to Ann H. Dickson. Lot 27, Justice's, Niles. Register's office, Berrien Co., Mich. Rec'd for record May 10, 1855, at 8 hours a. m. & recorded in Book Z of Deeds, on pages 401 & 402. Warren Chapman, register.

[Endorsed:] No. 1666. Anna H. Dickson *vs.* S. Waterman.

Sheriff's deed on mortgage sale to Anna H. Dickson. This deed will become opperative on the 15th day of March, A. D. 1866. Thomas Comins, sheriff of Berrien Co. Lot 27, Justice's, Niles. Filed March 25, 1853, at ? hours p. m. Chas. F. Howe, register. Filed May 25, '83. H. M. Hinsdill, cl'k.

88 It is hereby agreed between David Bacon, agent, of the city of Niles, Michigan, of the first part, and Francis M. Ives, of the city of Niles & State of Michigan, of the second part, as follows: The said David Bacon, in consideration of the rents and covenants herein specified, do- hereby let and lease to the said Francis M. Ives lot No. twenty-seven (27), William Justice's platt of the village, for the term of one — from and after the 17th day of July, 1879, on the terms and conditions hereinafter mentioned:

Provided, That in case any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said David Bacon or his certain attorney to re-enter into and repossess the said premises and the said party of the second part and each and every other occupant to remove and put out; and the said Francis M. does hereby hire the said premises by the month as above mentioned, and does covenant and promise to pay to the said David Bacon, agent, the monthly rent of one dollar per month, and in taking care & charge of the premises aforesaid, being the west 66 feet of the property known as the Reading House.

Witness our hands and seals this 18th day of July, 1879.

DAVID BACON, *Agent.*
FRANCIS M. IVES.

89 [Endorsed:] No. 1666. Lease. David Bacon, agent, to Francis M. Ives. Ex. No. 5. H. M. H., cl'k. Filed May 25, 1883. H. M. Hinsdill, cl'k.

90 SOLYMAN WATERMAN *vs.* EDGAR READING.

Ejectment.

Before Judge Smith & jury.

NOVEMBER 8TH, 1880.

Appearances: For plaintiff, E. Bacon; for defendant, J. Champlin.

Plaintiff offers in evidence a deed recorded in Liber R of Deeds of the register's office of Berrien county, on page 614; grantor, Anna H. Dickson; grantee, Solyman Waterman; dated May 8th, 1849; recorded May 11th, 1849.

DAVID BACON, a witness sworn for the plaintiff.

Direct examination by Mr. BACON:

Q. Where do you reside?
A. In Niles.
Q. In this county?
A. Yes, sir.

Q. About how long have you resided within a few miles of that place or at that place?

A. I have resided in Niles permanently since 1852 & in Cass county since 1835.

Q. Since what time?

A. Since 1835.

Q. About what distance from Niles was your home in Cass county?

A. Ten miles.

Q. What is your present age?

A. 52.

Q. State whether you were frequently in Niles in the year 1850.

A. Yes, sir.

Q. State whether you had relatives living there.

A. Uncle & cousins.

Q. State whether that was the market place where most of the business was done from your home.

91 A. It was the market place almost entirely for the whole of that country.

Q. State whether you know Solyman Waterman.

A. Yes, sir.

Q. State whether you know him in the summer of 1850.

A. Yes, sir.

Q. State whether you knew this lot 27.

A. Yes, sir.

Q. State where Solyman Waterman lived in 1850, & what he was doing.

A. He was keeping the old hotel that was known as the Old Diggins on lot 27; it was an old frame hotel; I think it was the first hotel in Niles.

Q. State whether he was in possession of this lot.

A. Yes, sir; he was there keeping hotel at that time.

Q. State whether he continued so for some time.

A. He continued there until the spring of 1851, when he rented it to Mr. Rounds, who kept it until 1854 as a hotel.

Q. While Waterman was there do you know whether he was claiming as owner?

A. Waterman claimed as owner & purchaser from Mrs. Dickson

Q. State whether you knew Edgar Reading.

A. I did.

Q. State who was in possession of this lot and occupying it in the spring of 1868 and for some years thereafter.

A. Dr. Reading.

Q. Edgar Reading?

A. Yes, sir.

Q. Defendant in this suit?

A. Yes, sir; Dr. Reading bought it, I know, in 1867; suit was commenced in 1868.

Q. Dr. Reading was then in possession?

A. Yes, sir.

92 Q. Of this lot 27?

A. Yes, sir.

Q. State whether Dr. Reading continued in possession from the spring throughout the year 1868.

A. Oh, yes; he built his hotel there in 1868; he was in possession for a number of years afterwards.

Cross-examination by Mr. CHAMPLIN:

Q. You say he built a hotel on that property?

A. Yes, sir; he commenced it in the spring of 1868?

Q. Did he complete it?

A. He completed it that & the ensueing year.

Mr. BACON: This is objected to as any evidence of improvement.

Mr. CHAMPLIN: It is not asked for that purpose.

Q. When do you say that Edgar Reading went into possession of these premises?

A. He bought them in the fall of 1867; he tore down the old hotel during the winter.

Q. Who was in possession immediately prior to him?

A. Malcolm Crofoot was the owner of it; I think he was keeping hotel at the time.

Mr. BACON: Do you mean owner?

A. He was the man in possession.

Q. He claimed to be the owner?

A. Yes, sir.

Mr. CHAMPLIN: Who did Crofoot get it from?

A. Anna H. Dickson.

Q. Do you know how these parties claimed to be in possession that you have mentioned; first let me ask who it was leased
93 to from 1851?

A. '51 to '54 it was leased to Henry Rounds.

Q. Do you know how he claimed to get possession?

A. Yes, sir.

Q. How?

A. Henry Rounds rented of Solyman Waterman.

Q. How did Mrs. Dickson get possession?

A. What I know of that is by the records.

Q. Crofoot went in under her, you say?

A. Yes, sir; in 1855.

Q. Did she claim to foreclose some mortgage?

A. The records show that I never had any conversation with her, but that was the general understanding that she foreclosed the mortgage.

Q. Are you a married man?

A. Yes, sir.

Q. What is your wive's name?

A. Lydia A. Bacon.

Q. Are you or she related to Waterman?

A. No, sir.

Q. Do you know where Waterman lives now?

A. Yes, sir.

Q. Is he living?

A. He is.
Q. Where does he live?
A. He was on the 17th of Oct.—he lives in California.
Q. Ever have any correspondence with him?
A. No, sir; not directly.
Q. Have you indirectly?
A. Yes, sir.
Q. Did you negotiate for the purchase of this property?
A. Yes, sir.

Mr. BACON: I object to it as evidence of any transfer after the commencement of suit.

COURT: It is to show the interest of the witness in the premises, I suppose.

Q. Have you negotiated for the purchase of this property?
A. Yes, sir.
94 Q. What is that property worth now?
A. Well, I can hardly tell you, but it cost a great deal of money.
Q. Can you tell about what it cost?
A. Dr. Reading claimed that the whole property on this lot & the other lot cost him 70 thousand dollars.
Q. Is that half of it?
A. This takes one-half—there is two lots—this takes one.
Q. What would be your judgment of the value of this property?
A. Well, sir, in the condition it is now this lot ought to be worth $15,000—from 12 to 15 thousand.
Q. Did you negotiate for the purchase of this property from Waterman?
A. Yes, sir.
Q. Did you pay any consideration?
A. Yes, sir.
Q. Did you pay the consideration named in the deed?
A. Yes, sir.
Q. Three hundred dollars?
A. Yes, sir; about five hundred is what it cost me; three hundred is what I paid him.
Q. Who did you have it conveyed to?
A. Lydia A. Bacon.
Q. That is your wife?
A. Yes, sir.
Q. Did you have any title before this deed?
A. Only by agreement with Mr. Waterman.
Q. Did you have a written agreement with him?
A. Not with him, but with Charles Hoppin in California.
Q. Who is he?
A. He is a gentleman that lives in California.
Q. What place?
95 A. He lives in Yolo county near Yolo.
Q. Is that where Waterman lives?

A. Waterman makes his home with this Hoppin, except when he is with his children in San Francisco.

Q. Were you personally acquainted with Hoppin?

A. Yes, sir.

Q. Did he go from this section?

A. Yes, sir.

Q. Where?

A. Niles.

Q. He lived at Niles?

A. Yes, sir.

Q. Is he one of the witnesses to that deed?

A. Yes, sir.

Redirect examination by Mr. BACON:

Q. When you speak of this property being worth $15,000, state whether you include the buildings.

A. As it stands to-day there are three 20-foot stores. I should think it was worth from 12 to 15 thousand.

Q. What would be the fair value of the lot if there was no building there?

A. With the old building that was on it?

Q. No; take it without any buildings.

A. I should think it would be worth from 5 to 6 thousand dollars.

Q. What would be your judgment that it would be worth with the old building as it stood when Reading purchased?

A. I should say, with the old building, to-day it ought to be worth $6,000—half of it; the building, as it stands now, is impracticable for any use; it cost a great deal of money; a building that
96 cost a quarter of that would be worth absolutely just as much money.

Q. That is, the present building on it?

A. Yes, sir.

Q. I ask you with the old building?

A. I think it ought to be worth $6,000.

Q. State whether this old building amounted to much of anything.

A. It was a frame hotel; it was torn down at the building of the present hotel. I think the old building was worth $1,000.

Q. What would the naked lot be worth to-day?

A. It ought to be worth from 4 to 5 thousand dollars; it is 66 feet front. I don't suppose it could be bought for less than that.

Q. Less than what?

A. It ought to be worth 100 dollars a foot. I should say it was, well, worth from 4 to 5 thousand dollars. Property sold 2 years ago just above there for $200 a foot.

Q. You have been inquired of on your cross-examination as to Mrs. Dickson getting this property under a mortgage foreclosure as against whom?

A. Mr. Solyman Waterman.

Q. State whether it was supposed to be the purchase-money?

A. I suppose so; of course I know nothing about that, only what the records show.

Recross-examination by Mr. CHAMPLIN:

Q. Where do you reside?
A. In Niles.
Q. Whereabout in Niles?
97 A. On the corner of 5th & Main, nearly opposite Pike's Hotel.
Q. You do not live in that hotel?
A. No, sir.
Q. Are you the agent of your wife?
A. Yes, sir.
Q. Have you possession of that hotel property?
A. I am having an office in there.
Q. Have you possession?
A. Yes, sir. My office is there & has been for six months.

Mr. BACON: How long did you say you had had possession of it as agent for your wife?

A. I have been there six months. There has been another party there over a year.
Q. Was he under your direction?
A. Yes, sir.

Mr. CHAMPLIN: Tell me when you went into possession.

A. I cannot tell you exactly; I think it was in the summer of 1878.
—. Tell me by what arrangement you got into possession.
A. After making this agreement with Mr. Waterman & paying him half of the money.
Q. What?
A. After having made this agreement with Mr. Waterman & paying him half of the money, then I went into possession. I think that was along in the summer or spring of 1878.
Q. How did he get in?
A. Who?
Q. Waterman was not in possession?
A. No, sir.
Q. Who was?
A. It was vacant.
Q. Who left it to make it vacant?
A. Nobody that I know of.
Q. Didn't Reading have possession there?
98 A. No, sir.
Q. When did the occupant leave it?
A. Let me see, I think the occupant left it in the fall of 1877.
Q. And the building remained vacant?
A. Yes, sir.
Q. No one in possession?
A. No, sir; not for a long —. There was two or three mortgages being foreclosed. The last occupant was a hotel-keeper.
Q. What was his name?
A. Charles Hilton, I believe, was the last one. I think he went out in 1877.
Q. Did you have any arrangement with him by which he gave up possession to you?

A. No, sir; never had any conversation with him.
Q. Left open & unlocked?
A. It was open there for months.

Mr. CHAMPLIN: I offer the stipulation of facts in evidence, signed by the attorneys in this case. I offer in evidence, Liber 66, page 7, a deed from Solyman Waterman to Lydia A. Bacon, dated October 16th, 1880, recorded October 27th, 1880, of the premises in question.

Mr. BACON: That is objected to; it is a deed since the commencement of suit, & therefore inadmissible.

Mr. BACON: The notices mentioned in the stipulation are offered in evidence. I will put in evidence the original bond, the original mortgage, & the original sheriff's deed, with all of the certificates.

99 Stipulation marked Exhibit 1; mortgage marked Ex. 2; sheriff's deed marked Ex. 3; bond marked Ex. 4.

Charge to the Jury.

Requests for the plaintiff & defendant read by the court.

GENTLEMEN OF THE JURY:

The facts in this case were presented under a stipulation to you upon which there is no dispute, & the only question presented here is purely a question of law for the court whether this foreclosure sale was sufficient to pass title, & the court instructs you that it was not sufficient to pass title; that it did not come up to the requirements of the statute in such cases, & that being the case your verdict will be for the plaintiff. You need not leave your seats unless you wish to; you can confer with each other & render your decision.

Defendant excepts to the refusal of the court to give the 3rd, 4th, & 5th requests asked by the defendant.

Defendant excepts to the giving of the 1st & 2nd request as asked by the plaintiff.

Defendant excepts to the oral instructions of the court upon the insufficiency of the notice of sale under the foreclosure by advertisement.

100 [Endorsed:] No. 1666. Filed May 25, 1883. H. M. Hinsdill, cl'k.

101 PL'FF'S EXHIBIT No. 3. H. M. H., Cl'k. May 25th, 1883.

Supreme Court.

EDGAR READING *vs.* SOLYMAN WATERMAN.

Waterman in August, 1868, began an *an* action of ejectment against Reading, who was in possession, as purchaser under mesne conveyances from Anna H. Dickson, of lot 27 in William Justice's plat of Niles, to recover that lot, on which Reading had begun and nearly completed very expensive improvements.

It appears from the record that Waterman, in May, 1849, bought this land of Anna H. Dickson and gave back a purchase-money

mortgage. On the eighteenth of December, 1852, she began to publish notice of a statutory foreclosure, the sale being fixed for March 15th, 1853, on which day she bid off the premises, and the deed was in a few days put on file with the register of deeds. The land was never redeemed and Waterman remained in possession until May 15th, 1855, when he surrendered possession to Mrs. Dickson, who subsequently sold to the party through whom Reading derived his title.

The ejectment suit was allowed to sleep until 1878, when it
102 was brought to trial, and Waterman prevailed in the Berrien circuit on the ground that the foreclosure was irregular. He proved no notice to quit and prevailed on the supposed defect of the foreclosure. He never redeemed and never offered to redeem. While it is the settled law of this State that a mortgagee has no right to take possession until foreclosure absolute, as decided in Newton *vs.* McKay, 30 Mich., 380, and Lee *vs.* Clay, 38 Mich., 223, as well as some other cases which have been before us, yet it was intimated in Newton *vs.* McKay that where a mortgagor voluntar-y puts a mortgagee in possession he may thereby preclude himself from relying on grounds otherwise open to him. We think it would be entirely wrong to allow a mortgagor who has deliberately and intentionally yielded up possession to a claimant whose rights, if any, are derived from his own contract to treat the possession as tortious and bring ejectment without either notice or payment. We have no doubt that Mrs. Dickson and her grantees were lawfully in possession whether the foreclosure was regular or not, and that they could not be ousted by ejectment; but inasmuch as the controversy hereafter may present some new features, we are obliged to consider the questions raised under the foreclosure itself. These questions arise
103 touching the notice of sale and the sheriff's deed. The sheriff's deed is said to be defective in two respects—it gives a wrong date to the mortgage and the certificate indorsed upon it declares the deed if not redeemed will become effectual on the fifteenth day of March, 1844, when it should have been 1854. The sheriff's deed described the mortgage correctly in all but the date, which was put as May 8th, 1848, when it should have been 1849. The names of the parties and the date and volume and page of record were properly set forth, as well as the day and place of sale and the amount of purchase-money. The statu-e contains no direction concerning the form of the sheriff's deed beyond the requirement that it shall correctly show the price of the parcels sold. In all other respects it leaves the instrument to be determined by the rules of the common law. There can be no difficulty from this deed in tracing it back to the mortgage as recorded, and any incorrect matter would at once be made manifest and corrected by that reference. State *vs.* Bruse, 36 Mich., 77; Shepard *vs.* Shepard, *Id.*, 175. In the absence of any statu-e to the contrary, we think the rules applicable to other deeds are applicable to this, and that the deed contains enough to remove any difficulty. The error- in the —
104 of statu-es have never applied to such powers any such technical rules as would impair the security of purchasers. The

power is part of the contract and should be construed on principles applicable to contracts, and not as a hostile process. The statu-es were intended to prevent surprise or unfairness and they should be enforced in everything substansial. Courts cannot disregard any of their positive provisions; but, on the other hand, those provisions cannot be enlarged or unreasonably construed so as to render mortgages sales unsafe or to make bidding hazardous.

The law was designed to encourage and not destroy recourse to these simple and cheap remedies; and while no substansial — should be disregarded, want of substansial regularity is all that should be held inoperative. The only things absolutely required in the notice of sale are the names of the parties original or by assignment, the date of the mortgage and of its record, the amount claimed to be due, and description substantially agreeing with that in the mortgage. In the present case the body of the notice contained the name of the mortgagor, but the mortgagee was named therein Dixon and not Dickson. These names, however, are the same and legally
105 identical; unless shown to refer to two advertisement-, cures itself by reference to the deed itself, from which the time of redemption could be determined at once. Johnston *vs.* Scott, 11 Mich., 232. Such a mistake was there held unimportant. The blunders which appear to have got into the notice of sale indicate very careless printing and the changes in the different issues are not easily explained; but how far they can be allowed to defeat the sale depends on the effect they were likely to have on persons interested. Authorities are cited and arguments made on this matter which relates to proceedings which are had of a hostile character and *ex parte*, when it is commonly held that such action, contrary to the usual course of law and against persons who have not the common law benefit of self-protection, should be held not valid unless conforming strictly to statutory authority. We held in Lee *vs.* Clavy, 38 Mich., 223, that statutory foreclosure did not come in all respects within the same mischief. The statu-es regulating them are made to enlarge and not to cut down the rights of mortgagors. Before such statu-es were passed, sales made under a power of sale contained in a mortgage were governed by the same rules applicable to the sales under any other power and counts in the absence —
106 different persons. Here the name of Mrs. Dickson, refer-ed to as a mortgagee, and the mortgage itself, removed any such possibility of error. The name signed to the notice was shifted by some accident to the types, but as the notice showed the foreclosure was on behalf of the original mortgagee, no harm could come from such a manifest slip, which could mislead no one. The notice was first published December 18th, but was dated December 28th. This was also of no account, as the error was palpable. The day of sale was properly given and the publication full. The notice gave the date of the mortgage once correctly and once incorrectly. The date and place of record and the volume and page were also given accurately. It was manifest on the face of the notice that one of these dates was wrong, and the means of correction were given by the record. It is indeed suggested that the date given correctly as

1849 refers to the bond, and not to the mortgage, which is mentioned as of 1848, the days of the month corresponding. This does not strike us forcibly, for it would not be likely that a mortgage given one year would refer to a bond not made until a year after.

It is not to be supposed that purchasers under foreclosure
107 sales look at the dates of instruments without consulting the records to ascertain the *the* state of the title. The information given by this notice directed every one immediately to the record, and that necessarily explained the true date of the two dates set out in the notice itself. We cannot imagine that any one could be deceived by the imperfection.

We are therefore of opinion that none of the mistakes were substantial or operated in any way to the prejudice of Waterman. Judgment should have been given in favor of Reading. As the case was tried by jury, we can render no final judgment on the merits, and can only reverse the judgment below, with costs of this court, and remand the case for a new trial at the circuit.

STATE OF MICHIGAN:

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of the opinion filed in said court in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Lansing, this 21st day of January, A. D. 1882.

[SEAL.] CHAS. C. HOPKINS, *Clerk.*

108 [Endorsed:] No. 1666. Copy. Supreme court. Edgar Reading *vs.* Solyman Waterman. Opinion. Filed May 25th, 1883. H. M. Hinsdill, clerk.

109 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
LYDIA A. BACON, DAVID BACON, JOHN A. MONTAGUE, and FRANCIS M. IVES.

Now comes said defendants, except John A. Montague, by Edward Bacon, their attorney, and request the court now here to find the facts specially in this suit.

EDWARD BACON,
Attorney for the Defendants, except John A. Montague.

[Endorsed:] No. 1666. United States of America. In the circuit court of the United States for the sixth circuit and western district of Michigan, southern division. The Northwestern Mutual Life Insurance Company *vs.* Lydia A. Bacon *et. al.* Request for special finding of facts. Filed May 25th, 1883. H. M. Hinsdell, clerk.

110 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff,

vs.

LYDIA BACON, DAVID BACON, FRANCIS M. IVES, and JOHN A. MONTAGUE, Defendants.

Now come the said defendants, Lydia A. Bacon, David Bacon, and Francis M. Ives, by Edward Bacon, their attorney, and respectfully request the court in this suit to make and file a special finding of all the facts, and in such finding to pass specially upon each of the following propositions of law.

EDWARD BACON,
Attorney for Defendant- Last Named.

111 I.

The mortgage given by Solyman Waterman to Anna H. Dickson never could legally be foreclosed by advertisement.

II.

The agreement of November 29th, 1848, which, with all its terms and conditions, was in the mortgage from Solyman Waterman to Anna H. Dickson, adopted and made a part of said mortgage, was never recorded, said mortgage without said agreement being recorded on pages 51 and 52 of Liber E of Mortgages in the office of the register of deeds of Berrien county, and therefore there was no such due recording of said mortgage as was sufficient to authorize foreclosure by advertisement.

III.

No power of sale in the mortgage from Solyman Waterman to Anna H. Dickson was operative between December 1st, 1852, and April 1st, 1853, to authorize foreclosure by advertisement.

IV.

The mortgage given by Solyman Waterman to Anna H. Dickson was never legally foreclosed by advertisement, so that the title in fee vested in Solyman Waterman passed from him.

112 V.

No title in fee passed from Solyman Waterman by the alleged foreclosure by advertisement, unless at the time of such foreclosure the record of the mortgage and the advertisement of mortgage sale were sufficient in law under the statu-e as to foreclosure by advertisement; and if said foreclosure at the time thereof was insufficient to pass title, no facts not appearing in said record and advertisement and which ought to have appeared thereby, so that a purchaser at the mortgage sale in March, 1853, could rely on record evidence thereof, can enable plaintiff to recover under the evidence in this case.

VI.

The stipulation given in evidence in this suit begins with a declaration that it is limited to matters of fact, and no matter of law placed therein as to the legal effect of any writing or proceeding is obligatory or sufficient to create any estoppel, so that any error of law must prevail against the truth.

Thayer *vs.* Arnold, 32 Mich., 341.

Brewster *vs.* Stryker, 2 Comstock, N. Y., p's 19–41.

VII.

If any defendant at the commencement of this suit was in peaceable possession of the lot described in the declaration
113 and, at the same time held the legal title to said lot in fee, the plaintiff cannot recover against such defendant, whose rights could be no less than those of a defendant under a plea of *libernum tenementum* in action of trespass. Greenl'f on Ev., vol. 2, secs. 626, 311, 312. And any such defendant at the commencement of this suit was entitled to the benefit of the judgement in Berrien county in the ejectment suit by Solyman Waterman against Edgar Reading.

C. L., 1871, sec. 6243.

VIII.

If the plaintiff has rights concerning improvements the proper remedy is in equity, unless the statu-es of Michigan establishing remedies concerning improvements in ejectment suit are sufficient here.

IX.

The opinion of the Michigan supreme court offered in evidence is not *res adjudicata;* it orders a new trial where the whole case as to facts and law must be opened for review.

114 [Endorsed:] No. 1666. United States of America. In the Circuit court of the United States for the *United States for the* sixth circuit and western district of Michigan. The Northwestern Mutual Life Insurance Company *vs.* Lydia A. Bacon *et al.*, defendant. Requests to find. Filed May 25th, 1883. H. M. Hinsdell, clerk. Edward Bacon, defendants' attorney.

115 *Trial by the Court Without a Jury, May* 25, 1883.

The Circuit Court of the United States for the Western District of Michigan, Southern Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
LYDIA A. BACON, DAVID BACON, JOHN A. MONTAGUE, & FRANCIS M. IVES.

In ejectment.

Findings and decision by S. L. Withey, district judge, September 3, 1883.

Champlin & More, attorneys for the plaintiff; Edward Bacon, attorney for the defendants.

1. This action of ejectment was commenced in June, 1881, to recover possession of lot 27 of William Justice's plat of the village of Niles, Berrien county, Michigan, of which premises defendants were then in possession, the said defendant, Lydia A. Bacon, claiming title and the other defendants claiming possession under her as tenants or otherwise. The premises, at the time of the commencement of this suit, were of the value of from twelve to twenty-five thousand dollars. Solyman Waterman is the common source of title to both the plaintiff and the defendant, Lydia A. Bacon, he having owned
the property in fee and the right of possession May 8th, 1849.
116 The controversy turns upon the legality of proceedings to foreclose a mortgage given by said Waterman to Anna H. Dickson on the day last named to secure the payment of fourteen hundred dollars, purchase price of the property, payable in five equal annual instalments on the 29th of November, with interest quarterly, each year.

2. Upon said foreclosure the premises were bid off by the mortgagee, for $684.80; the time for redemption expired without any one redeeming; a deed executed by the sheriff of the county who made the sale to the purchaser, Anna H. Dickson, was duly recorded, and she entered into actual possession of the premises as purchaser at such foreclosure sale, claiming title April first, 1855. Anna H. Dickson continued in possession until the eleventh day of the month and year last aforesaid, when, by warranty deed, she conveyed the premises to one Crofoot, who remained in possession until September 20th, 1867, and on that day, by warranty deed, conveyed to Edgar Reading, who entered and continued from thence in the actual possession of the premises until the year 1876.

3. The said Edgar Reading executed a mortgage of the property to plaintiff to secure the payment of $——. It was dated June 19th, 1874, was duly recorded and foreclosed by a suit brought by plaintiff on the equity side of this court, in which suit said Reading and others were made defendants. A decree of foreclosure and for the sale of the premises was obtained in the suit and a sale thereof in pursuance of such decree to the plaintiff. The sale was duly confirmed
and the property was conveyed by the master's deed to the
117 plaintiff, dated and executed October 28, 1879. Complainant is a corporation organized and doing business under the laws of the State of Wisconsin and authorized to purchase and hold real estate.

3. There is no controversy concerning the proceedings in equity to foreclose the mortgage given by Reading to plaintiff nor as to the sale and conveyance of the property under the decree in that case. The contention relates to the prior mortgage foreclosure from the purchaser at the sale, under which plaintiff claims that Reading, by mesne conveyances, acquired the valid title to the premises and mortgaged the same to plaintiff, and that it acquired the title by purchase at the foreclosure sale under the aforesaid decree in equity against Reading.

7. As to the foreclosure of Waterman's mortgage to Anna H. Dickson, the proceedings as to which are claimed by defendants to have

been illegal and invalid, the court finds that said mortgage contained the usual power of sale upon default in the payment of any part of the sum thereby secured to be paid, and the parties have stipulated in this cause, by their respective attorneys, that at the time the foreclosure of said Waterman mortgage was commenced there was due and unpaid thereon $664.50, and that no proceeding at law had been commenced to recover any part of the debt. The statute of Michigan is that "every mortgage of real estate containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement in the cases and in the manner hereinafter specified." It then specifies, among other things, that the mortgage must have been recorded; that a
118 notice that said mortgage will be foreclosed by a sale of the mortgaged premises shall be given by publishing the same for twelve successive weeks, at least once in each week, in a newspaper printed in the county where the premises are situated, and that such notice shall specify—

1. The names of the mortgagor and mortgagee.
2. The date of the mortgage and when recorded.
3. The amount claimed to be due thereon at the date of the notice, and
4. A description of the mortgaged premises.

2 Compiled Laws of 1871, paragraphs 6912, 6913, 6914, & 6915.

8. The court finds further that, December 18th, 1852, Anna H. Dickson caused notice that said mortgage from Solyman Waterman to her would be foreclosed by a sale of the mortgaged premises describing them, to be published in the Niles Republican, a newspaper printed in the county where said premises are situated. The day of sale fixed in the notice was March 15, 1853, a copy of which notice is set forth in paragraph 4th of the stipulation of facts signed by the attorneys of the respective parties, dated October 19th, 1881, on file in this cause. That notice, as printed, is dated "Dec. 28th, 1852," ten days subsequent to the date of the first publication of said notice. It describes the mortgage as having been given "by Solyman Waterman to Anna H. Dixon, both of the village of Niles, in the State of Michigan," and "dated the eighth day of May, 1848," whereas the real date of the mortgage is 1849 and the real name of the mortgagee is "Dickson." Again, as then published, the notice is signed "Anna H. Dixon, mortgagee." With such mistakes
119 the notice was published once in each week in said newspaper for three successive weeks; then "Dixon" was changed to "Dickson," where the name is appended to the notice. With no other change in the notice it was published the fourth, fifth, and sixth weeks in successive order of the weeks. The seventh publication of the notice was January 29th, 1853, when the letters in the name "Dickson," appended to the notice, became misplaced so as to read "Dickens." The notice was then published weekly in said paper till February 12th, 1853, on which day's publication the final letter "e" in the word "mortgagee," appended to the signature,

disappeared from the notice. No other changes or mishaps occurred. The notice was then published, for and including the remainder of the period of twelve successive weeks, once in each week in said newspaper.

The notice states correctly that the mortgage is recorded "in Book E of Mortgages in the office of the register of deeds of Berrien county, in said State, on the eleventh day of May, 1849, at two and one-fourth o'clock afternoon, on pages fifty-one and fifty-two." The notice also contains the following: "There is claimed to be due on said mortgage, at the date of this notice, the sum of six hundred and fifty-four dollars and fifty-four cents on bond in said mortgage mentioned, dated May 8, 1849."

9. The sale took place at the time specified in said notice and the mortgagee, Anna H. Dickson, was the purchaser for $684.80, she being the highest bidder for the premises. The sheriff who
120 made the sale executed to her a deed and endorsed thereon when the same would become operative if the premises were not redeemed. The mortgage had been duly recorded prior to the commencement of the proceedings to foreclose; but an agreement referred to in the body of said mortgage as having been made between the parties to the mortgage on the 29th of November, 1848, adopted and made part of the mortgage, was not recorded, nor was the bond in said mortgage mentioned recorded. Reference is hereby made to the original mortgage, marked "Defendants' Exhibit No. 2," introduced in evidence by the defendants and filed in the cause for the terms thereof. There is a stipulation in said mortgage giving the mortgagor a right to pay any sum not exceeding one thousand dollars of the fourteen hundred dollars thereby secured, to be paid at any time before the last instalment should be paid, by a bond and mortgage well securing such sum on other real estate in the said village of Niles.

10. August 25, 1868, Solyman Waterman commenced suit in the circuit court of the county of Berrien in ejectment against said Edgar Reading to recover possession of said premises; to which suit Reading appeared and pleaded the general issue. That suit has been once tried in 1880, resulting in a judgment for the plaintiff therein, but, on error, the supreme court of the State reversed said judgment and remanded the cause for a new trial, and the cause is still pending and undetermined in said circuit court of Berrien county.

11. Said Solyman Waterman, for the consideration of three hundred dollars, conveyed, October 16th, 1880, to defendant,
121 Lydia A. Bacon, all his right and title to said premises, under which deed she claims title herein.

12. The supreme court of Michigan, in 46 Mich. R., 107, deciding the case, on error to the circuit court of Berrien county, of Waterman *vs.* Reading, held the foreclosure proceedings by Anna H. Dickson, mortgagee, were not so far irregular or defective as to defeat the title of the purchase at that foreclosure sale, notwithstanding the mistakes in the notice of sale as published.

This court follows the ruling of that tribunal and finds the notice as published for the foreclosure of the mortgage made May 8th,

1849, to Solyman Waterman *to* Anna H. Dickson was legally sufficient, and that the latter acquired a valid title to the premises as purchaser at that sale.

The court finds that the said last-mentioned mortgage was duly recorded and could be and was lawfully foreclosed by advertisement.

Finally the court finds that the said defendants unlawfully at the time of the commencement of this suit withheld said premises and the possession thereof from the plaintiff, and that said plaintiff herein is entitled to recover from said defendants the possession thereof.

Let a judgment be entered accordingly.

S. L. WITHEY,
Dist. Judge.

121½ [Endorsed:] U. S. cir. court, west. dist. Mich., south division. Northwestern Mutual Life Ins. Co. *vs.* Lydia A. Bacon *et. al.* Finding & decision of the court. S. L. Withey, dist. judge. Filed Sept. 3, 1883. H. M. Hinsdill, clerk.

122 *Orders.*

UNITED STATES OF AMERICA, } *ss:*
Western District of Michigan, Southern Division, }

U. S. Court.

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 3d day of September, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States of America the one hundred and eighth—present, the Honorable Solomon L. Withey, district judge—among the proceedings then and there had were the following, to wit:

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
LYDIA A. BACON, DAVID BACON, FRANCIS M. IVES, and JOHN A. MONTAGUE., } No. 1666.

This cause having been brought to trial before the court without a jury, and said court, after hearing the proofs and allegations of the parties and the arguments of counsel and after due deliberation thereon, having found (as the decision of the court this day filed more fully shows) that the said defendants were at the time of the commencement of this suit guilty of unlawfully withholding from the said plaintiff the premises described in its declaration in this cause as situate in the city of Niles, county of Berrien, in said western district of Michigan, and being known and designated as lot number twenty-seven (27) in William Justice's Addition to Niles, as designated on the recorded plat thereof; recorded in Book
123 "C," page 627 and that the said plaintiff is well entitled to hold the same in fee; and having assessed the damages of the said plaintiff by reason thereof, over and above his costs and charges by

him about his suit in this behalf expended, at the sum of six cents:

Therefore it is considered that the said plaintiff do recover against the said defendants the possession of the said premises according to the finding aforesaid, and that it have a writ of possession therefor according to the force, form, and effect of his said recovery.

And it is further considered that the said plaintiff do recover against the said defendants its damages aforesaid assessed, together with its costs and charges to be taxed, and that the said plaintiff have execution therefor.

124 *Taxed Bill of Costs.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
vs.
LYDIA A. BACON, DAVID BACON, JOHN A. MONTAGUE, and FRANCIS M. IVES, Defendants.

Plaintiff's bill of costs.

Attorney'- fee by statute					$10
Marshal's fees					23
Clerk's fees					10 50
Examiner or com'r's fees					
Master's fees					
Printer's bill (not included in above)					
Certified copy charter N. W. Mut. Life Ins. Co.					1 00
Register of deed (not included in above)					
Witnesses' fees:	Miles travel.	Days.			
William H. Ramsey, Grand Rapids	2	1	$1 60		
Lewis Hoyt, Niles, Mich.	192	1	11 10		
David Sheehan, "	192	1	11 10		
George Wheeler, Milwaukee, Wis.	230	1	13 00		
			36 80		36 80
Affidavit to fee bill					
Total					$81 30

THE UNITED STATES OF AMERICA, } ss:
Western District of Michigan, Southern Division, }

I hereby tax the foregoing bill of costs at the sum of eighty-one and $\frac{30}{100}$ dollars.

Dated Sept. 21, 1883.

HENRY M. HINSDILL, *Clerk,*
By JOHN McQUEWAN, *Deputy.*

125 THE UNITED STATES OF AMERICA, } ss:
Western District of Michigan, Southern Division, }

John H. Champlin, being duly sworn, says that the foregoing items of cost charged as disbursements have actually been paid or the liability therefor incurred and were necessary and are reasonable in amount; that the witnesses above named were in good faith made to attend and were deemed material and necessary, and they respectively traveled the number of miles and actually attended the number of days specified, and that the copies and exemplifications charged for were actually and necessarily used or necessarily and in good faith obtained for use.

—— ——.

Sworn to and subscribed before me this 14th day of September, A. D. 1883.

CHARLES M. WILSON,
Notary Public, Kent Co., Mich.

To Edward Bacon, Esq., attorney for defendants:

Take notice that the foregoing is a copy of the plaintiff's bill of costs proposed to be taxed and of the affidavits to be read in support thereof, and that application will be made to the clerk of the said court to tax the same, at his office, on the 21st day of September, A. D. 1883, at 10 o'clock a. m.

Dated this 14th day of September, A. D. 1883.

CHAMPLIN & MORE,
Att'ys for the Plaintiff.

THE UNITED STATES OF AMERICA, } ss:
Western District of Michigan, Southern Division, }

Charles M. Wilson, being duly sworn, says that on the 14th day of September, A. D. 1883, at 9.30 o'clock a. m., he served a copy of the above bill of costs, affidavit, and notice of application for taxation upon Edward Bacon, attorney for the defendants, by depositing the same in the post-office at Grand Rapids, inclosed in an envelope, postage fully prepaid, addressed to said Edward Bacon, at Niles, Michigan, that being the residence of said Edward Bacon.

—— ——.

Sworn to and subscribed before me this 18th day of September, A. D. 1883.

FRED. A. MAYNARD,
Notary Public, Kent Co., Mich.

— consent to the taxation of the within bill of costs at the sum of —— dollars and —— cents, on condition, however, that ——.

Dated this — day of ——, A. D. 188–.

——,
— for —.

[Endorsed:] No. 1666. Circuit court of the United States for the sixth circuit and western district of Michigan, southern division. N. W. Mut. Life Ins. Co. *vs.* Lydia Bacon *et al.* Taxed bill of costs.

Plaintiff's costs taxed at $81.30. Filed Sept. 21st, A. D. 1883. Henry M. Hinsdell, clerk. Champlin & More, att'ys for plaintiff.

126 UNITED STATES OF AMERICA:

In the Supreme Court.

LYDIA A. BACON, DAVID BACON, JOHN A. MONTAGUE, and FRANCIS M. IVES, Plaintiff- in Error,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant in Error.

Afterwards before the justices of the Supreme Court of the United States came the same Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives, plaintiff- in *the* error, by Edward Bacon, their attorney, and say that in the record and proceedings aforesaid and also in giving the judgment aforesaid there are manifest errors as hereafter stated, to wit:

There is error in this, that the finding of the court upon the facts as aforesaid does not support the judgment aforesaid.

There is also error in this, that the judgment aforesaid is
127 not supported by the aforesaid finding of the court upon the facts.

There is also error in this, that no finding aforesaid of the court upon the facts is sufficient to support the judgment aforesaid.

There is also error in this, that the finding aforesaid of the court does not support the judgment aforesaid.

There is also error in this, that the special finding of the court upon the facts as aforesaid shows that the judgment ought not to have been for the plaintiffs in the circuit court as aforesaid, but ought to have been in favor of defendants in said court.

There is error, in this that by the law of the land the finding and judgment aforesaid ought to have been in favor of said plaintiffs in error and against said defendant in error, and said plaintiffs in error pray that the judgment aforesaid for the errer aforesaid and other errors in the record and proceedings aforesaid may be reversed, overruled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment aforesaid.

EDWARD BACON,
Attorney for Plaintiff- in Error.

128 [Endorsed:] No. 1666. United States of America. In the Supreme Court. Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives, plaintiffs in error, *vs.* The Northwestern Mutual Life Insurance Company, defendant in error. Assignment of error. Filed Sept. 14th, 1885. H. M. Hinsdell, clerk. Edward Bacon, attorney for plaintiffs in error.

129 To Henry M. Hinsdell, clerk of the circuit court of the United States for the western district of Michigan:

SIR: Whereas in action of ejectment lately pending in said court,

in which action the Northwestern Mutual Life Insurance Company was plaintiff and Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives *was* defendants, judgement has been rendered in favor of said plaintiff and against said defendants, as more fully appears of record; and

Whereas said defendants desires without delay to carry said case on error into the Supreme Court of the United States:

Please issue a writ of error in due form accordingly, wherein said defendants shall be named as plaintiffs in error and wherein said Northwestern Mutual Life Insurance Company shall be named as defendants in error. Let said writ of error be in proper form, according to the rules, statu-es, and pra-tice in such case made and provided.

Dated December, A. D. 1884.

Yours, &c., EDWARD BACON,

130 *Attorney for Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives, as Plaintiffs in Error.*

[Endorsed:] No. 1666. The circuit court of the United States for the western district of Michigan, southern division. Lydia A. Bacon *et al.*, plaintiffs in error, *vs.* The Northwestern Mutual Life Insurance Company, defendants in error. Precipe for writ of error. Filed December 10th, 1884. H. M. Hinsdell, clerk.

131 United States of America to the Northwestern Mutual Life Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, A. D. 1885, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, southern division, in which writ Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives are plaintiffs in error and you, The Northwestern Mutual Life Insurance Company aforesaid, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error in said writ of error mentioned should not be corrected and why speedy justice to the parties in that behalf should not be done.

132 Witness the Honorable S. L. Withey, district judge of the western district of Michigan, and holding there the circuit court of the United States for said district, southern division, this 10th day of December, A. D. 1884.

S. L. WITHEY,
U. S. D'st. Judge.

No. 1666.

I hereby accept service of a copy of the within citation Dec. 10th, 1884.

CHAMPLIN & MORE,
Att'ys for Northwestern Mutual Life Insurance Co.

UNITED STATES OF AMERICA.

WESTERN DISTRICT OF MICHIGAN, } ss:
County of Kent, }

Edward Bacon, of the city of Niles, in said district, being first duly sworn, says that on the 10th day of December, 1884, in said county of Kent, he personally extended the within citation to John E. More, of the above-named firm of Champlin & More, who then signed the said form now above.

EDWARD BACON.

Subscribed and sworn to before me this 10th day of December, A. D. 1884.

CHESTER B. HINSDELL,
Clerk D'st. Court.

133 [Endorsed:] No. 1666. The circuit court of the United States for the western district of Michigan, southern division. Lydia A. Bacon, —, plaintiffs in error, *vs.* The Northwestern Mutual Life Insurance Company, defendants in error. Citation. Filed Dec. 10th, 1884. H. M. Hinsdell, clerk.

134 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Michigan, southern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The Northwestern Mutual Life Insurance Company, plaintiff, *vs.* Lydia Bacon, David Bacon, Francis M. Ives, and John A. Montague, defendants, a manifest error hath happened, to the great damage of the said defendants, Lydia Bacon, David Bacon, Francis M. Ives, and John A. Montague, and plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
134½ the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 10th day of December, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] HENRY M. HINSDILL,
Clerk of the Circuit Court for the Sixth Circuit and Western District of Michigan.

Allowed by—
S. L. WITHEY,
U. S. Dist. Judge.

135 [Endorsed:] No. 1666. The Supreme Court of the United States. Lydia A. Bacon *et al.*, plaintiffs in error, *vs.* The Northwestern Mutual Life Ins. Co., defendant in error. Copy. Writ of error. Lodged with clerk Dec. 10, 1884. H. M. Hinsdill, clerk. Edward Bacon, att'y for plaintiffs in error.

136 Know all men by these presents that we, Orville W. Coolidge and Charles A. Chapin, of the city of Niles, in the county of Berrien and State of Michigan, and James G. Bacon, of the township Ontua, Cass county, Michigan, all as sureties, are held and firmly bound unto The Northwestern Mutual Life Insurance Company, a corporation existing under the laws of the State of Wisconsin, in the full and just sum of five hundred dollars lawful money of the United States, to be paid to the said corporation, its successor or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of December, A. D. 1884.

Whereas in a suit lately depending in the circuit court of the United States for sixth circuit and western district of Michigan, southern division, between the said Northwestern Mutual Life Insurance Company, as plaintiff, and Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives, as defendants, judgment was rendered in favor of said plaintiff, said The
137 Northwestern Mutual Life Insurance Company, and against the said defendants, Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives, for the recovery of certain premises in the city of Niles, in the county of Berrien and State of Michigan, in value exceeding five thousand dollars, and the said defendants, Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives, having obtained a writ of error and filed the same, together with a copy thereof, in the office of the clerk of said circuit court, to remove the record and proceedings in said suit into the Supreme Court of the United States, and the said defendants also having obtained and served a citation, directed to the said The Northwestern Mutual Life Insurance Company, admonishing it to appear at a Supreme Court to be holden at Washington on the second Monday of October next, A. D. 1885:

Now, therefore, the condition of this obligation is such that if the said defendants, Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives, shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make the plea good, then the above obligation to be void; else to remain
138 in force and virtue.

ORVILLE W. COOLIDGE. [L. S.]
CHARLES A. CHAPIN. [L. S.]
JAMES G. BACON. [L. S.]
—— ——. [L. S.]

Signed, sealed, and delivered in presence of—
EDWARD BACON.
S. BACON. [L. S.]

STATE OF MICHIGAN, } ss:
County of Berrien, }

Orville W. Coolidge and Charles A. Chapin, of said county, being each severally sworn, depose and say that each of them has in the southern division of the western district of Michigan and in the county of Berrien or the county of Cass therein property liable to execution to an amount exceeding in value five hundred dollars over and above all his debts and liabilities.

——— ———.

Subscribed and sworn to before me this 6th day of December A. D. 1884.

CHARLES T. LARAMORE,
Notary Public p'r Berrien County, Mich.

139 STATE OF MICHIGAN, } ss:
County of Berrien, }

James Bacon, being duly sworn, says he has in the southern division of the western district of Michigan and in the county of Cass therein property liable to execution to an amount exceeding in value five hundred dollars over and above all his debts and liabilities.

JAMES G. BACON.

Subscribed and sworn to before me this 5th day of December, A. D. 1884.

SAMUEL BACON,
Notary Public.

Approved:
S. L. WITHEY,
U. S. D'st. Judge.

[Endorsed:] No. 1666. United States of America. In the circuit court of the United States for the sixth circuit and western district of Michigan, southern division. The Northwestern Mutual Life Insurance Company *vs.* Lydia A. Bacon, David Bacon, John A. Montague, and Francis M. Ives. Bond on writ of error. (No. 1666.) Filed Dec. 1st, 1884. H. M. Hinsdill, clerk. I apprehend that this bond — sufficient, but have no personal knowledge. J. E. More.

140 THE UNITED STATES OF AMERICA, } ss:
Western District of Michigan, Southern Division, }

I, Henry M. Hinsdill, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, do hereby certify that the foregoing is a true and compared copy of the files and records and the whole thereof in the proceedings of said court in said entitled cause.

Witness my official signature and the seal of said court, at Grand

Rapids, this 9th day of October, in the year of our Lord one thousand eight hundred and eighty-five.

{ Seal of the U. S. Circuit Court, Western District of Mich., Southern Division. }

HENRY M. HINSDILL, *Clerk.*

Endorsed on cover: W. Michigan C. C. U. S. No. 173. Lydia Bacon, David Bacon, Francis M. Ives, and John A. Montague, plaintiffs in error, *vs.* The Northwestern Mutual Life Insurance Company. Filed October 21, 1885.

UNITED STATES OF AMERICA,

IN THE

CIRCUIT COURT,

OF THE UNITED STATES, FOR THE SIXTH CIRCUIT AND WESTERN DISTRICT OF MICHIGAN—SOUTHERN DIVISION.

DAVID BACON,
FRANCIS M. IVES and
JOHN A. MONTAGUE,
Surviving Plaintiffs in Error,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant in Error.

Brief for Plaintiffs in Error.

EDWARD BACON,
Of Counsel for Plaintiffs in Error.

NILES, MICHIGAN:
MIRROR BOOK AND JOB PRINT.
1888.

UNITED STATES OF AMERICA
—IN THE—
SUPREME COURT.

Error to the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

LYDIA A. BACON, L. David Bacon
JOHN A. MONTAGUE and
FRANCIS M. IVES,
Plaintiffs in Error,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant in Error.

BRIEF FOR THE PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

This is an action of ejectment, commenced in June, 1881; tried without a jury in May, 1883; there is no bill of exceptions; there is a special finding of facts, filed on due request under R. S. of U. S., sec- 3

The plaintiffs in error have in vain done all in their power to limit the printing of the transcript in this case to the common law record.

tions 649, 700; (record, folio 115. 121) : errors are assigned on said finding in effect that it is insufficient to support the judgment for the plaintiff in the Circuit Court, (record, folios 126, 127,) "thus presenting here the several questions of law affecting the merits of the case. 120 U. S. p. 30. (Certain writings, appearing in the record, are referred to in the finding, namely : the stipulation, (folios 15, 21 ;) the mortgage and bond (folios 79, 85 ;) the opinion published in the 46th volume of Michigan Reports, commencing on page 107, said opinion being filed April 27th, 1881 ; a copy thereof appearing in the record (folios 101, 198.)

The finding has these words (fol. 116: "The controversy turns upon the legality of proceedings to foreclose a mortgage given by said (Solyman) Waterman to Anna H. Dickson on the last day named, (May 8th, 1849,) to secure the payment of fourteen hundred dollars, purchase price of the property, (lot 27 in William Justice's plat of the village of Niles, Berrien county, Mich,) payable in five equal annual instalments on the 29th day of November, with interest quarterly each year. The finding in legal effect determines from the evidence that the question as to the legality of said foreclosure must from facts and documents duly set forth be decided according to the merits of the case. The finding, including the writings therein referred to, as above mentioned, show the following facts :

Solyman Waterman, in this case, the common source of title, was, at the date of said mortgage, in possession of said lot and the owner thereof in fee simple ; that at the commencement of this suit, Lydia A. Bacon, having purchased said lot from him was in peaceable possession thereof by the other defendants in the court below, as her tenants, she claiming the lot in fee simple by deed from him to her, dated October 16th.

1880.

The finding has these words (folio 120): "An agreement, referred to in the body of said mortgage, as having been made between the parties to the mortgage on the 29th day of November, 1848, adopted and made part of the mortgage, was not recorded, nor was the bond, mentioned in said mortgage, recorded. Reference is hereby made to the original mortgage, marked defendant's exhibit number 2, introduced in evidence by the defendant and filed in this cause, for the terms thereof."

Said exhibit at folio 80 has words as follows:— "According to the terms and conditions of the agreemens made between the parties on the 29th day of November, 1848. reference to which is hereby made, and the same in all its terms and conditions is adopted and made part of this mortgage." This agreement, dated November 29th, 1848, was never put in evidence and its contents are unknown. The writing, exhibit 2, known as the mortgage, does not contain all the conditions on which it depends, but refers for unknown conditions to the agreement. Said mortgage contains a remarkable reservation of special rights, fully appearing in folio 80, and set forth in the finding (folio 120) as iollows:

"There is a stipulation in said mortgage giving the mortgagor a right to pay any sum not to exceed one thousand dollars of the fourteen hundred dollars thereby secured to be paid at any time before the last installment should be paid, by a bond and mortgage well securing such sum on other real estate on said village of Niles."

The alleged foreclosure of mortgage, given by Solyman Waterman to Anna H. Dickson, was by advertisement, first published in December, 1852, the proceedings being described in the finding. (Folios, 118, 119, 120.) After such foreclosure, the mortgagee took possession of said lot (20, 15,) made a conveyance of the lot to Malcolm Crofoot, who conveyed to Edgar Reading. In August, 1868, Soly-

man Waterman commenced against Edgar Reading, in the Circuit Court for the county of Berrien in the State of Michigan, a suit of ejectment for said lot, (folio 12) and in November, 1880, recovered judgment in said suit, in the usual form of ejectment,—(Folios 46, 47, 102.) there being no claim for improvements (35).

In April, 1881, the Supreme Court of Michigan reversed said judgment and remanded the case to Berrien Circuit Court for a new trial, where said suit is still pending. The North Western Mutual Life Insurance Company, by foreclosure of a mortgage given by Edgar Reading, in 1874, obtained his claim through a master's deed, executed in October, 1879, (folios 116, 29,) and after the said decision of the Supreme Court of Michigan, the said Company, though having control of the defence, in the suit in the State Court, and though having obtained said decision, nevertheless, to obtain certain advantages in gaining possession without waiting for the determination of said suit, commenced in June, 1881, the action of ejectment now here, to recover possession of the lot aforesaid.

Such is the effect of the statutes of Michigan that Solyman Waterman, if successful on the new trial ordered by the State Supreme Court in his case, would have recovered, not the lot in question, but its value, without any buildings or improvements, to be legally claimed by Edgar Reading or his assigns.

MICHIGAN REVISED STATUTES OF 1846.

CHAPTER 130.

Of the foreclosure of mortgage by advertisement:

Sec. 1. Every mortgage of real estate, containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner hereafter specified.

Sec. 2. *To entitle any party* to give a notice as

hereinafter prescribed and to make such foreclosure, *it shall be requisite,*

1. That some default in a condition of such mortgage shall have occurred, *by which the power to sell became operative.*

2. That no suit or proceeding shall have been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or if any suit or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part; and,

3. *That the mortgage containing such power of sale has been duly recorded;* and if it shall have been assigned, that all the assignments thereof shall have been recorded;

4. In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage for each of such installments may be foreclosed in the same manner, and with the like effect as if such separate mortgages were given for each of such subsequent installments, and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such installments had been made upon an independ- prior mortgage.

Sec. 3. Notice that such mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for *twelve successive weeks, at least once in each week,* in a newspaper printed in the county where the premises intended to be sold, or some part of them, are situated, if there be one; and if no newspaper be printed in such county, then such notice shall be published in a paper published at the seat of government.

Sec. 4. Every such notice *shall specify,*

1. The names of the mortgagor and of the mortgagee, and the assignee of the mortgage, if any;

2. *The date of the mortgage and when recorded.*

3. The amount claimed to be due thereon at the date of the notice; and

4 A description of the mortgaged premises, conforming substantially with that contained in the mortgage."

* * * *

Sec 8. "The mortgagee, his assigns, or his or their legal representatives, *may fairly and in good faith*, purchase the premises so advertised, or any part thereof, at such sale."

There never has been any amendment that could effect the case now here.

See Howell's statute of Michigan, Chapter 293.

ERRORS RELIED UPON.

The same being made to appear by the finding and mortgage exhibit 2, therein referred to.

I.

The plaintiff's in error, being at the commencement of this suit, in peaceable possession, which must have been taken or confirmed by virtue of the judgment in the suit in the state court, were entitled to retain their possession until final judgment on the new trial ordered by the Supreme Court of Michigan, or until the termination of said suit, which is still pending.

II.

The finding is insufficient to support the judgment because it fails to show whether or not the possession by Edgar Reading was abandoned and because it does not show that the possession of any plaintiff in

error originated illegally, or did not originate by proper writ of possession under the judgment in the state court, or that there was any failure to pay the one thousand dollars, with a bond and mortgage, within the time limited by the reservation in the mortgage or afterwards.

Said sum necessarily included all that was claimed as unpaid in the foreclosure by advertisement, wherein the alleged sale took place, March 15, 1853, (folio 118-119,) while the time limited for the payment of the one thousand dollars with the bond and mortgage could not have expired prior to November 29th, 1853, or November 29th, 1854. The finding does not show the non-payment of any instalment becoming due after December, 1852, and does not show what was done or left undone under the reservation in the mortgage. and does not show that the purchase by the mortgagee at the mortgage sale, March 15th, 1853, was made "fairly and in good faith," as required by the statute, and is silent as to " buildings and improvements."

III.

The power of sale contained in the mortgage never became operative because the time limited for the payment with the bond and mortgage of all the money mentioned in the notice of mortgage sale did not expire until long after such sale and because the agreement, dated November 29th, 1848, and containing conditions of the mortgage, exhibit 2, was never recorded, and these conditions are left unknown.

IV.

The power of sale contained in said mortgage, exhibit 2, was never duly executed. The notice of mortgage sale did not give the date of the mortgage, but in place thereof, gave an untrue date, said notice during more than half of the twelve weeks of publication required by law, was without the signature of

the mortgagee and appeared to have the signature of another person. Said notice in all its publications, except the first two, had a date, indicating that said notice originated less than twelve weeks before the day for mortgage sale, March 15th, 1853. Folios 118, 119, 120; 16 to 20.

V.

The finding declares that the controversy turns on the legality of the proceedings to foreclose by advertisement (116) and necessarily implies that the plaintiffs in error were entitled to judgment in their favor if such proceedings were illegal, and inasmuch as the facts and documents aforesaid, show said proceedings to be illegal, it appears that the plaintiffs in error are entitled to judgment in their favor. The finding raises all possible presumptions in favor of a judgment for the plaintiffs in error and the legality of their possession if the proceedings to foreclose by advertisement were illegal.

ARGUMENT.

I.

The finding of facts is no more than a special verdict. No facts not therein stated, can be supplied. No inferences of fact except those which no possible evidence could remove, can be made. The evidence is no part of the common law record on which this case now here depends.

French v. Edwards, 21 Wall. 147.
Wood v. Weimer, 104 U. S. 787.
Allen v. St. Louis, 120, U. S. 30.
Tillman v. Fuller, 13th Mich. 120.
Donahan v. Wards Estates, 40 Mich. 30.
Yelverton v. Steele, 40 Mich. 540.
Goodrich v. City of Detroit, 12 Mich.

A

There has never been in this controversy any claim of title under the statutes of limitations, or that Solyman Waterman lost any rights by any such statute, and if he is to be accused of any laches, it is certain that the evidence might have been sufficient to show that he was not guilty; there is no finding that he was guilty nor is any laches or neglect on his part mentioned in the finding; on the contrary, it is declared that the controversy turned on the legality of the proceedings to foreclose by advertisement, and thereby is an exclusion of any question as to laches or any possibility that the controversy shall turn on any such question, or on any question other than that in relation to the legality of said proceedings to foreclose.

II.

POSSESSION.

The stipulation in the State court (37, 41) repeated (52, 56) is immaterial here; it was only evidence in another suit for another cause of action, to wit: the ejectment of Solyman Waterman from his possession prior to his suit. Said stipulation, by its first lines, is declared to be for the purposes of said suit; it was signed on behalf of Solyman Waterman after he had conveyed away the lot described in the declaration It was filed Nov. 8th, 1880 (40.) His deed was dated October 16th, 1880. (120.) Admissions in one suit create no estoppal in another.

Jacobson v. Miller, 41 Mich. 99.
Keyser v. Sutherland, 59 Mich. 465.

Q.

The admission in paragraph eight of the stipulation in the State court, that Solyman Waterman surrendered possession, is the basis of the decision, 46 Mich. 107, but for the purposes of the suit now here, the new stipulation was made (15, 21) in which said section eight is reformed (20,) so as to take the surrender out of this case.

It declares that the mortgagee took possession; the finding is in accordance therewith. (116.) No surrender is mentioned in the finding; it is excluded from this case.

The finding declares that "the controversy turns on the legality of the proceedings to foreclose a mortgage given by said Waterman to Anna H. Dickson."

These words must be taken in connection with the closely preceding words: "This action of ejectment was commenced in June, 1881, to recover possession of lot 27 of William Justices' plat of the village of Niles, Berrien county, Michigan, of which premises defendants were then in possession, the said defendant, Lydia A. Bacon, claiming title and the other defendants claimed possession under her as tenants or otherwise." (115.)

The conclusion of the Circuit Judge at the end of his finding is that the foreclosure proceedings were legal, and this conclusion is made the only cause for finding "that said defendants, unlawfully at the time of the commencement of the suit, withheld said premises and the possession thereof from the plaintiff."—The necessary meaning is that if the proceedings to foreclose the Waterman mortgage were illegal, the controversy ought to be decided in favor of the defendants in the Federal Circuit Court, the plaintiff could not recover and the defendants were lawfully in possession. That the controversy here, unlike that on the record before the Supreme Court of Michigan, depends on the legality or illegality of the foreclosure proceedings, and not on any claim to possession which Edgar Reading ever had and on which said Supreme Court decided that the case did turn whether the foreclosure proceedings were legal or illegal. It is evident that if the foreclosure proceedings were illegal and the legal title remained in Solyman Waterman, his grantee might legally enter into possession under such title. It is evident that if the grantee of Solyman Wa-

terman, at the commencement of this suit, held the legal title and was in peaceable possession of the premises in question, this possession was legal, whether the entry by which it commenced was on finding the premises vacant, on surrender by Edgar Reading, or even by force, followed by continued peaceable occupancy. The finding is inconsistent with any theory such as that this possession was unlawful if the foreclosure proceedings were illegal.—There is no finding that the possession originated illegally in any way. No such illegality of origin can be presumed; such presumption would not only be a matter of fact not found and resting on inference or argument, but would be contrary to the finding which depends for all its effect on the conclusion that the foreclosure was legal.

The finding leaves the possession by Edgar Reading entirely disconnected with the subsequent possession by the plaintiffs in error, but necessarily means that the possession by Edgar Reading terminated, is out of existence and out of this case; it added nothing to the legal effect of the foreclosure on which this case must turn.

The possession of the plaintiffs in error belonged to one side of the controversy. There is nothing in the finding to entitle the defendant in error to recover by reason of the prior possession of Edgar Reading if the foreclosure was illegal. Every presumption in aid of the peaceable possession of the plaintiffs in error is left in full force.

Ricard v. Williams 7 Wheat. 107

If the mortgage, exhibit 2, was not legally foreclosed in 1853, Edgar Reading may have known that it was paid or that the rents and profits during the long occupancy under the mortgage, were more than sufficient to pay it, and may have known that any consent to such occupancy had been revoked or would be revoked; or for any reason to him seeming sufficient, he may have abandoned his possession and ended its effect in this suit.

Sabariego v. Maverick, 124 U. S. 207-8, in which, at top of page 298. is the following language:

"That is to say the defendant's possession is in the first instance, presumed to be rightful. To overcome that presumption, the plaintiff, showing no better right by a title regularly deduced is bound to prove that being himself in prior possession he was deprived of it by a wrongful intrusion of the defendant, whose possession therefore, originated in a trespass."

Also at top of page 299 is the following:

"It therefore appears that prior possession is sufficient to entitle a party to recover in an action of ejectment only against a mere intruder or wrong doer, or a person subsequently entering without right."

Gamble v. Horr, 40 Mich. 565.
Farmer v. Drescal, 45 Mich. 337.
Newton v. Doyle, 38 Mich. 649, 650.

In Newton v. Kay, 30 Mich., 382, the court says as to rights of mortgagees in possession: "Whatever authority exists in such a case originates in the license and not in the mortgage, and forms no part of the original contract."

The stipulation (19), and the finding (116) exclude the license from this case.

Presumptive right of the mortgagor to eject the mortgagee.

Humphrey v. Hurd, 29 Mich., 44.
Ferris v. Wilcox, 51 Mich., 107.

B

The finding is entirely consistent with legal possession in the defendant's in error by the execution of a writ of possession, issued on the judgment in the state court mentioned in the finding, or by the effect of said judgment prior to its reversal in legalizing their existing possession.

Huntington v. Farkson, 7 Hill, 196.

Mason v. Kellogg, 38 Mich. 143.
Gower v. Quinlan, 40 Mich. 575.

Howell's Statutes, section 7827-7828, as follows:

"If the plaintiff shall have taken possession of the premises by virtue of any recovery in ejectment, such possession shall not in any way be affected by the vacation of any judgment, as herein provided; and if the defendant recover on any new trial hereby authorized, he shall be entitled to a writ of possession in the same manner as if he were plaintiff.

* * Upon any new trial granted as herein provided, the defendant may show any matters in bar of a recovery which he might show to entitle him to the possession of the premises if he were the plaintiff in the action."

The defendant in error could not by voluntary change of forum while claiming great advantages under the opinion filed in the suit in the State Court, deprive plaintiffs in error of any of the benefit of said suit to stop the running of the statute of the statute of limitations.

C

~~There has not been in the state court or in the federal court in this controversy, any claim under~~

The action of ejectment, commenced by Solyman Waterman, was not barred.

Stambaugh v. Snoblin, 32 Mich. 297.

The defendant in error cannot reasonably claim here under the opinion filed in the suit in the state court, all that could be claimed thereunder in the said court, and much more, and at the same time ask this court to disregard benefits of said suit to the plaintiffs in error, as to the statute of limitation or as to possession.

III.

The claim of the North Western Mutual Life Insurance Company that the plaintiffs in error are, by the opinion of the Supreme Court of Michigan, 46 Mich., 107, estopped from insisting on any illegality on the foreclosure by advertisement, is invalid.

A

The common law, excluding estoppels by a single judgment in an action of ejectment ~~rendered upon a verdict~~ is in full force in Michigan, excepting modification by the statute. Howell's Statutes, section 7821. "Every judgment in the action of ejectment rendered upon a *verdict*, shall be conclusive as to the title established in such action, upon the party against whon the same is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action, *subject to the exceptions hereinafter contained.*"

Sec. 7822. The court in which such judgment shall be rendered at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs, executors, administrators or assigns, and upon payment of all costs and damages recovered thereby, shall grant a new trial in said cause."

The Supreme Court of Michigan, construing these statutes in Keyser v. Sutherland, 59 Mich. 465, uses the following language:

"A party is entitled to but one trial, as a matter of right in this state, in an action of trespass, while in ejectment, upon payment of costs of the first trial, he has an absolute right to another trial, of which no court can debar him, How. Stat. section 7822; Dennison v. Genessee Circuit Judge, 37 Mich. 285. A single judgment in ejectment is not necessarily final for any purpose.

Rice v. Auditor General, 30 Mich. 13-14."

See also Busch v. Nestor, 62 Mich. 383.

Cook v. Judge of Kent county, 37 N..W.Rep. 909.
Strother v. Lucas, 12 Pet. 409.
Miles v. Caldwell, 2 Wall. 35.
Equator Co. v. Hall, 106 U. S. 87.
Britton v. Thornon, 112 U. S. 535.

There was but one judgment in the state court—namely that of Solyman Waterman. Folio 120.

No opinion, without any judgment, could create an estoppel if the judgment could not. B.

The declaration in the State court (31,) states the possession and ejectment of Solyman Waterman on the first day of July, 1868; the declaration in the case now here, states the possession and ejectment of the North Western Mutual Life Insurance Company in June, 1881. (Folio 1.) These declarations are for different causes of action; there is no judgment in the suit in the State Court, and there is no estoppel to shut out the truth in the case now here.

Cromwell v. County of Sac, 94 U. S. 354, 356, 358. This decision is cited and followed in Jacobson v. Miller, 41 Mich. 96.

The opinion of Waterman v. Reading, 46 Mich. 107, was open to review by the Supreme Court of Michigan, according to the practice of said court, whenever the case should appear there again on return to writ of error after the new trial ordered.

Wagnor v. Eggleston, 46 Mich. 610.

In this case, when it was for second time on writ of error before said court, Judge Cooley, in rendering the unanimous decision, said:

"But even now the plaintiff does not abandon his former construction of the proposition, but contends that it should be understood as speaking from the time of acceptance. As this was the point on which the case chiefly turned when here before, it is apparent that we are asked to review and reverse the for-

mer decision. We should do so if we believed it incorrect, but we do not."

The same court, in Larzaleer v. Starkweather, 38 Mich. 100, uses the following language:

"The reasoning in an opinion is not that of the court, but of the judge who prepares and delivers it. It may or may not be considered sound and unanswerable, and as such, is the subject of criticism. The conclusion arrived at and announced upon the several questions discussed and essential to a proper disposition of the case is that of the court, and in concurring such conclusions, it is not generally supposed or understood that every thing contained or said in the opinion is thereby unqualifiedly and unquestionably adopted as the opinion of the court."

C

Any judgment of any court of record in Michigan may be reconsidered and set aside long after the term of court at which it was entered.

Campau v. Coates, 17 Mich. 235.

Van Rensalear v. Whiting, 12 Mich. 449.

D

The defendant in error ought not to succeed by mere change of ~~form~~ to deprive the plaintiffs in error of a right to have the opinion aforesaid reviewed and to render such opinion conclusive in this court, when it would not be conclusive in the Supreme Court of Michigan. The defendant in error could not by voluntarily leaving the suit in the State court, pending and undecided, and commencing the new suit in the Federal Court, cause the opinion of the Supreme Court of Michigan to have any more effect in this court than it would have had in the Supreme Court of Michigan, had the case gone there again, after the new trial ordered.

Ex Parte Fisk, 113 U. S. 725.

"Nor does the language of the court in Duncan v. Gegan, 101 U. S. 810 go so far. When it is there said that 'the circuit court has no more power over what was done before the removal than the State Court would have had if the suit had remained,' it is in effect affirmed that it has at least that much power."

The opinion disposes of the case presented by the record before the Supreme Court of Michigan, without touching any question now left in the controversy. The decisive words are these, 46 Mich., 109: "We think it would be entirely wrong to allow a mortgagor who has deliberately and intentionally yielded up possession to a claimant, whose rights, if any, are derived from his own contract, to treat the possession as tortious and bring ejectment without either notice or payment. We have no doubt that Mrs. Dickson and her grantees were lawfully in possession whether the foreclosure was regular or not, an that they could not be ousted by ejectment.

In Northern Bank v. Porter township, 110 U. S. 615, are the following words:

"But this court said in Cohens v. Virginia, 6 Wheat, 264, and again in Carroll v. Lessee of Carroll, 16 How. 275, 287, that it was a maxim not to be disregarded that general expressions in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Van Vleet v. Blackman, 39 Mich., 732.

E.

The opinion, 46 Mich., 109, immediately after the last quotation therefrom, contains these words:

"Inasmuch as the controversy hereafter may present some *new features*, we are obliged to consider the *questions raised* under the foreclosure itself.

These questions arise touching the notice of sale and the sheriff's deed."

These words imply that the controversy is not to be closed by the opinion; is to continue as an open controversy; that it may not be confined to the suit before the court; that it may come in some other suit or suits, among which might be a suit in equity to redeem. The opinion made no attempt to describe or limit the new features that might afterwards be presented; they might be in matters of fact or matters of law, and might even in a suit then before the court, be such as to make substantially a new case. The words last above copied from the opinion plainly indicate the intention of the court to decide no questions except those raised concerning the notice of sale and sheriff's deed. The opinion nowhere says that on the record before the Supreme Court of Michigan, no other questions could be raised, and nowhere says that with the new features that might in the future be presented in the controversy, no other questions could arise. On the contrary, the implication is clear that with the new features that might be presented, might come questions for decision other than those raised on the record as it existed at the time of the opinion or decided in the opinion, and such questions the court intentionally leaves undecided."

The decision contains no instruction that on any future trial where new features might be presented, the case should be taken from the jury; no such instruction could be reasonably given without knowing or defining what these new features might be. The decision ends with the declaration of the inability of the court to render final judgment and an unconditional order for a new trial. This order, in connection with the words of the court as to new features to be presented, means that on the new trial in the open controversy, Edgar Reading, or his grantee, would have a chance to prevail and the court did not intend

to decide in advance against him.

Jacobson v. Miller, 41 Mich. 98, 100.

F.

The opinion must show with sufficient certainty, what was decided and nothing can be assumed in addition thereto.

Detroit R. R. Co. v. Guthard, 114 U. S. 137.
Ingraham v. Dawson, 20 Howard, 491.
Supervisors v. Kennicot, 94 U. S. 499.
Gross v. U. S. Mortgage Co. 108 U. S. 486-7.
Adams Co. v. Burlington and Mo. R. R. Co. 112 U. S. 128-9.
Boyd v. Alabama, 94 U. S., 646.

G.

The opinion can be no estoppel in any matter where it is uncertain and ambiguous.

Russel v. Place, 94 U. S. 606.
Campbell v. Rankin 99 U. S. 261.
St. Clair v. Cox, 106 U. S. 351.

IV. A

THE LAW OF THE CASE.

No question under the reservation in the mortgage or as to the statutory requirement for recording the mortgage before foreclosure by advertisement, was in the State court, ever presented or decided.

The opinion of the Supreme Court of Michigan ought to have no greater effect in the Federal Court, as the law of the case, than it would have in the state court. No voluntary removal of the controversy into the Federal Court by either party or his assigns, ought to give any advantage by extending the legal effect of the opinion to any matter not therein actually decided and tharein made resadjudicata without uncertninty or ambiguity. The state court, on the new trial ordered, was not concluded as to any ques-

tion of fact to be tried, and the opinion did not fix any matter of fact,

White v. Campbell, 25 Mich. 471.

Marcott v. Marquette, Houghton & Ont. R,R, Co. 47 Mich. 5.

a.

If the State Supreme Court had intended to decide that on the new trial, unconditionally ordered Solyman Waterman could never recover, the order for a new trial would never have been made as it was.

Mynning v. Detroit L. & N. R. Co. 35 N. W. Rep. 811.

In Parcels v. Johnson, 20 Wall., 654, the language of this court is as follows:

"The judgment of the Supreme Court of Missouri, brought up in this case, is one of reversal only and remanding the suit to the inferior court for further proceedings in accordance with the opinion delivered and filed. The cause was sent back, therefore, for a new trial or a new hearing. Upon such trial or hearing the inferior court can proceed to render a new judgment, not inconsistent with the opinion, and that judgment may, in its turn, be taken to the Supreme Court for examination."

No decision here, construing the reservation, declaring rights thereunder or declaring the power of sale inoperative, because there was no sufficient compliance with the statute requiring the mortgage to be duly .ecorded, would be inconsistent with the opinion.

In MaComb v. Knox County, 91 U. S. 2, is the following language:

"The Court of Common Pleas was not directed to enter a judgment rendered by the Supreme Court and carry it into execution, but to proceed with the case according to law. The Supreme Court, so far from putting an end to the litigation, purposely left it open."

See also Ex Parte French, 1 Otto, 423.

Inasmuch as there is no judgment, the opinion is not *res adjudicata* or the law of the case on any question not therein decided, even if such question might have been presented or was actually presented.

Cromwell v. County of Sac, 94 U. S. 354-356.

Jacobson v. Miller, 41 Mich. 90.

The words of this court in Brooks v. Missouri, 124 U. S. 400, concerning the opinion of a State Supreme Court which disposed of a case without deciding a question presented, are as follows:

"It disposed of the supposed constitutional question presented in the argument without a direct decision, upon a ground which cannot be reviewed by us, and which was not evasive merely, but real. Chouteau v. Gibson, 111, U. S., 200. Adams County v. Burlington & Missouri R. R., 112 U. S., 123, 126, 127. Chapman v. Goodnow, 123 U. S., 540, 548. Such being the case, the decision of the alleged Federal question was not necessary to the judgment rendered and consequently is not sufficient to give us jurisdiction.

Murdock v. Memphis, 20 Wall., 590, 563."

As to construction of opinions, see

West v. Brashear, 14 Peters, 51.

Northern Bank v. Porter Tp., 110 U. S. 615.

No estoppel without final judgment.

Reed v. Proprietors, &c., 8 How., 291.

City of Aurora v. West, 7 Wale 82.

Bucher v. Cheshire R. R. Co., 125 U. S., 578-9.

B

If the new trial had been ordered without any opinion filed, there would have been no law of the case. There was no final judgment in the State Court to raise any implications or presumptions to

sustain it. The only judgment was in favor of Solyman Waterman that he was owner on fee, was entitled to possession. There is neither law nor reason to extend the opinion to questions that might have been decided; and here are applicable all the decisions of this court, declaring that there is no *res adjudicata* as to the most important constitutional questions presented to State Supreme Courts, but omitted in opinions affirming final judgments by deciding other questions undecided. Especially,

Detroit R. R. Co. v. Guthard, 114 U. S., 137.

There can be no estoppel to prevent the plaintiffs in error from having the benefit of any legal truth involved in this case as to any matter on which the opinion of the Supreme Court of Michigan is uncertain or ambiguous.

Bigelow on Estoppel, 4 Ed. p. 57, sec. 6 and cases therein cited.

Russell v. Place, 94 U. S. 608-610.

"To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined, that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter." * * (610.)

"According to Coke, an estoppel must be certain to every intent;" and if upon the face of the record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence. See Aiken v. Peck, 22 Vt. 260, and Hooker v. Hubbard, 102 Mass. 245."

C

The parts of the opinion aforesaid concerning the questions raised as to the notice of mortgage sale and the sheriff's deed are not conclusive in the case now here because they were not necessary to the decision of the case presented in the record before the court at the time of the opinion, and which was expressly disposed of in the opinion without any thing in relation to said notice of sale or deed; and because they were made in advance for some case to appear afterwards, with new and unknown features, therefore they are no better than *obiter dicta.*

Northern Bank v. Porter Tp. 110 U. S. 615.
Van Vleet v. Blackman, 39 Mich. 732.

The opinion of the Supreme Court of Michigan and any admissions and stipulations by the parties set forth in the record before said court, come into existence in the suit of Watermen v. Reading, after both parties had parted with all their rights to the land in question; and inasmuch as said suit is pending and without any final judgment, it does not appear how the *pendente lite* purchasers can here be estopped by any such stipulations, admissions or opinion in such suit, signed subsequent to their purchases.

~~III.~~ V

There are presented now here, new features in the controversy concerning which the opinion of the Supreme Court of Michigan is not *res adjudicata*, and ~~the~~ questions arise which were neither presented nor decided in said court and therefore are open for decision in this court.

Boyd v. Alabam, 94 U. S. 646.
Cromwell v. County of Sac. 94 U. S. 354.
Russell v. Place, 94 U. S. 606.
Furguson v. Smith, 3 N. E. Rep. 867.
Commercial Union Assurance Co. v. Scammon, 12 N. E. Rep. 326.
Umlauf v. Umlauf, 6 N. E. Rep. 456.
Blenner v. Coerger, 42 Ill. 497.

In Batty v. Snook, 5 Mich. 239, 249, the Supreme Court of Michigan uses the following language:

"Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee, by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud and no undue influence brought to bear upon him for that purpose by the creditor. But it cannot be done by a cotemporaneous or subsequent executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures."

Also, in Ferris v. Wilcox, 51 Mich., 108 are the following words:

"If, upon the face of the papers, examined in the light of surrounding facts, there were any doubt of the intent, the law taking notice of the advantage the creditor must always have over his debtor whose property he holds in mortgage, would give the debtor the benefit of the doubt, and hold his equity of redemption to be still existing.

Odell v. Montross, 68 N. Y. 499.
Trucks v. Lindsey, 18 Iowa, 504.
Montgomery v. Spect, 55 Cal. 359."

In Chicago and Vincennes R. R. Co. v. Fosdick, 106 U. S. 71, this court uses the following language: "The right to redeem is a favorite equity and will not be taken away, except upon a strict compliance with the steps necessary to divest it.

Bigler v. Waller, 14 Wall. 297.
Shillaber v. Robinson, 97 U. S. 68."

The new features here presented show that the power of sale contained in the mortgage exhibit 2, was not operative at the time of the sheriff's sale in March, 1853. This feature of the case received attention for the first time on the trial of this case in the Federal Court in 1883, (folios 111, 114) and is presented as a question of law and construction by the words of the mortgage, reserving to Solyman Waterman at any time before the time for making the last payment, the right to pay one thousand dollars with a bond and mortgage, which must be according to the unknown terms and conditions of the agreement, dated November 29th, 1848. It is evident that this reservation contemplated that a sum as great as one thousand dollars might be unpaid and in arrear up to the last day before the time for making the last payment, which could not be sooner than November 29th, 1853, and ought not to be sooner than November 29th, 1854. The one thousand dollars being greater than the sum of the principal of the three annual payments, each being two hundred and eighty dollars, would certainly pay any part of the mortgage debt less than one thousand dollars and in arrear at the time of paying such one thousand dollars.

The right reserved to Solyman Waterman to make any apply the one thousand dollar payment on the mortgage debt, implies that as much as this might be due at one time and of course include payments in arrear. For each payment in arrear at the time for making the one thousand dollar payment, there would be plainly two pay days; one when the installment first became due and another at the time of paying the one thousand dollars. The time for paying the one thousand dollars had no limit within the time to expire on the day before the day for paying the last installment. The reservation of the right to pay the one thousand dollars on the mortgage debt plainly provides for installments falling due and re-

remaining unpaid until their amount might equal one thousand dollars.

The total amount claimed due in the notice of mortgage sale in December, 1852, was much less than one thousand dollars, and was therefore entirely within the reservation and subject thereto. The mortgagor had a perfect right, on the last day before the day for paying the last installment, to pay with the bond and mortgage, all of the money claimed due in the notice. If the mortgagee could, under this mortgage, claim that on the day of the mortgage sale, March 15th, 1853, the sum of six hundred and eighty-four dollars and eighty-cents was due, the mortgagor certainly had up to the end of the time limited for paying the one thousand dollars, an absolute right to pay with the bond and mortgage all the amount claimed due in the notice or at the sale.

As to the use of the word "due," see United States v. Bank of North Carolina, 6 Pet. 29.

The mortgage appoints a day for each payment in money which went to make up the sum claimed due in the notice. All the first pay days for these installments had passed and the money claimed as due in the notice was due in the sense that the first pay days of these installments had passed and the money was unpaid; but thereafter, up to the end of the time limited in the reservation the mortgagor had the absolute right to pay the same with the bond and mortgage, and this bond and mortgage was to be according to the terms and conditions of the contract, dated November 29th, 1848, which might require that none of the principal should be payable before the expiration of ten years, or might require the payment to be made in the construction of a house or in specific chattels.

There is no reason why the mortgagor could not, with the consent of the mortgagee, reserve to himself the right to pay any installment after it should

become due and within any time in the mortgage limited thereafter. He might so reserve the right to make this payment, either in money or in chattels. The money would be due on the day for paying the installments and the mortgagor would have the absolute right to pay it afterwards, within the time limited, and it would matter not whether such payment was to be in money or chattels. The result must be that the mortgage, Exhibit 2, declares for the mortgagor the absolute right to pay with the bond and mortgage the whole amount claimed due in the notice or at the mortgage sale, at any time within the time limited for the payment of the one thousand dollars; and this right so to pay the mortgage is equivalent to a declaration that the mortgage must remain a mortgage for every dollar which might be paid on it as a mortgage. It secured to the mortgagor the right of payment for all of the money claimed due in the notice until the day for paying the last installment, and this right of payment was a special right of redemption. The mortgage must continue redeemable according to its terms; that is by payment with the bond and mortgage, up to the last day limited for making such payment. Therefore the express terms of the mortgage forbade and excluded foreclosure by advertisement, such as was attempted at and before the sale, March 15th, 1853, and this is apparent by the terms of section 11 of chapter 130, of the Revised Statutes of Michigan for 1846, which required that after the mortgage sale the redemption should be within one year, should be in money by payment of the amount bid, with interest from the time of sale at the rate of ten per cent per annum. (The mortgage and bond state no rate of interest, and therefore bore interest at the rate of seven per cent.) The effect of the alleged foreclosure would then be to deprive the mortgagor of his right assured him to pay the same money claimed due in the notice and at the sale with the

bond and mortgage mentioned in the reservation, and to raise the rate of interest from seven to ten per cent. Here was the contract in the mortgage, exhibit 2, assuring the mortgagor that the mortgage should remain redeemable according to the reservation until the last day of the time limited for the payment of the one thousand dollars. This right of redemption, so continued and reserved, rendered the attempt to foreclose by advertisement ~~nuperative~~ inoperative, because of the nature of the right to redeem, and the maxim, "once a mortgage, always a mortgage."

MICHIGAN REVISED STATUTES OF 1846.

CHAPTER 34.

Sec. 2. "The interest on money shall be at the rate of seven dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding ten per cent."

CHAPTER 130.

Sec. 11. "If the mortgagor, his heirs, executors or administrators, or any person lawfully claiming from or under him or them, shall, within one year from the time of such sale, redeem the premises sold, or any distinct lot or parcel thereof separately sold, by paying to the purchaser, his executors, administrators or assigns, or to the Register of Deeds in whose office such deed is deposited, for the benefit of such purchaser, the sum which was bid therefor, with interest from the time of the sale, at the rate of ten per cent per annum; then such deed shall be void and of no effect."

The time limited for redemption under the reservation did not expire till long after the mortgage sale, in March, 1853, and therefor this right of redemption has never been foreclosed and could not possibly be cut off in advance by the foreclosure by advertisement.

The attempted foreclosure by advertisement under the power of sale was of no effect, because by the express terms of the mortgage the power of sale was not to become operative until the expiration of the "time above limited" for payment. The time limited for the payment of the amount claimed due in the notice and at the sale did not expire till long after the mortgage sale, so that all the proceedings for foreclosure were before the power became operative, either according to the legal effect of the mortgage, or according to its express terms.

There was no default, sufficient under the mortgage, to render operative, its power of sale.

Albert v. Grosvenor Investment Co., Law Reports, 3 Queen's Bench, 127.

Butler v. Ladue, 12 Mich., 180.

There were doubtless, reasons which to the mortgagor and mortgagee seemed good and sufficient for all parts of the mortgage as it is written.

The mortgagee may have desired to obtain the bond and mortgage by means of which the sum of one thousand dollars was to be paid and which must be according to the terms and conditions of the agreement dated November 29, 1848. These terms and conditions may have provided for interest at ten per cent, the principal not to be paid until the expiration of ten years or otherwise may have been greatly for the interest of the mortgagee, who may have had the mortgage written so as to offer a strong inducement to the mortgagor to give her the valuable seeurities provided for in the reservation. She may

have been willing that any installment of principal and interest up to one thousand dollars, becoming due prior to the last installment, should remain due and unpaid for a long time, if they could become consolidated into the bond and mortgage. The mortgage, being a purchase money mortgage, probably for a part of the premises therein described, the mortgagor may have made the amount of the purchase money sufficiently great to buy of the mortgagee the privilege of allowing installments to remain due and unpaid until the amount so due and unpaid would be one thousand dollars, to be paid by him all at once in the bond and mortgage provided for in the reservation. In such case, the fourteen hundred dollars would contain consideration for such privilege so purchased by the mortgagee. The parties certainly were free to contract that any installments, becoming due to the amount of one thousand dollars, should remain due up to the day next before the time for the last installment, without any proceedings to enforce collection or without any right in the mortgagee to foreclose in any manner, or without any right in the mortgagee to foreclose by advertisement. The money claimed due in the notice of the mortgage sale published in December, 1852, might be due in every sense of the word "due," and yet the mortgagee might, by the terms of the mortgage, be deprived of the power to foreclose by advertisement. Here would be no more than an ordinary case of an agreement by a creditor to delay legal proceedings a reasonable time after a debt became due.

If the sum of money mentioned in the advertisement of mortgage sale, was due and unpaid, there was still no default, such as to render the power of sale operative, because the mortgagee, by the words of the reservation, said to the mortgagor, "you need not pay such sum in money at all; you have a right to pay said sum with a bond and mortgage any time

hereafter before the time for making the last payment."

The contract as to the payment of the one thousand dollars differs entirely from the ordinary contract in a mortgage, allowing foreclosure for non-payment of interest on a sum to fall due at a day subsequent to the day for the interest to fall due. In such case there would be no contract assuring to the debtor that the right to pay the interest, and thereby, of course, to cancel the mortgage lien for the same, should be continued to a future day certain.

In the mortgage, Exhibit 2, the one thousand dollars is to include installments of interest no less than installments of principal past due, and the right to cancel the mortgage lien for all these sums up to the amount of one thousand dollars is assured to the mortgagor throughout time, limited by the reservation for the payment of the one thousand dollars. The words are, "At any time hereafter, before the the time of making said last payment." Plainly the first installment might be a part of the one thousand dollars to be paid according to the reservation. This first installment would become due not less than four years before the last installment would become due. The statuatory time for redemption in any foreclosure proceedings to be commenced soon after the first installment became due, would expire long before the expiration of the time assured to the mortgagor, within which he might, with the bond and mortgage, pay this first installment. The full extent of this time is assured to the mortgagor for paying with the bond and mortgage past due installments of either interest or principal or both. In ordinary mortgages, allowing foreclosure for installments of interest on principal not due, no future time is assured to the mortgagor wherein he may have the right to pay the same after they fall due, and the different pay days are for different moneys,

not for the same moneys, as in Exhibit 2. If any mortgage, having the usual provision for foreclosure on non-payment of an installment of interest, four years before the principal should fall due, should contain a reservation to the mortgagor of a right to pay the past due installment of interest in services or in chattels at any time within three years after the interest fell due, it could not be reasonably contended that the right contained in the reservation was forfeited by non-payment of the installment of the interest when it first fell due, and that foreclosure by advertisement could be commenced immediately after the installment of interest fell due, without waiting for the expiration of the three years specified in the reservation. Had there been no mortgage, and had a suit at law been commenced in December, 1852, to collect the amount claimed due in the notice of sale, there would have been a good and sufficient defense to such suit under the reseravtion contained in the mortgage and in the bond, assuring to the mortgagor the right to make payment at any time before the expiration of the time limited in the reservation according to the terms thereof, and that this right secured to him a right up to the end of said time to decide whether he wonld make payment according to such reservation or make no payment at all; and that the suit must fail because he could not be deprived thereby of these contract rights.

The reservation would not begin to have effect until an installment fell due, and it would be absurd to contend that the non-payment thereof which muet bring the reservation into operation would deprive debtor of the benefit of the reservation.

In the mortgage, Exhibit 2, the one thousand dollars was to include installments past due, either of principal or interest, or both; and that such installments were past due at the time of the notice of the mortgage sale was a reasonable cause to give the mortgagor the full benefit of the reservation and not

deprive him of this benefit.

Solyman Waterman had such rights and equities that the foreclosure proceedings ending in the sale, March 15th, 1853, were, according to the desision of the Supreme Court of Michigan, nullities..

In Olcott v. Crittenden, 36 N. W. Rep. 43, tne court soys :

"The attempted foreclosure by advertisement was a nullity. The statutory foreclosure is not adapted to cases where there are conflicting equities which can only be worked out and protected in a court of chancery."

See also Thurston v. Printes, 1 Manning Mich. 197.
Huxley v. Rice, 40 Mich. 73.

D.

If the mortgage sale was, as to land title, a nullity at its date, March 15th, 1853, it is so at the present time, and the finding shows nothing to deprive the defendants in error of their title or possession.

VI.

THE RECORDING.

The foreclosure by advertisement was a nullity because there was no such record as the statute required, and therefore the power of sale never became operative. The finding of the court declares that as a condition precedent to any foreclosure by advertisement, the mortgage must have been recorded; and finding further has these words : "But the agreement referred to in the body of said mortgage as having been between the parties to the mortgage, adopted and made part of the mortgage, was not recorded." the Supreme Court of Michigan has decided that the statutory provisions requiring the recording, are peremptory and cannot be avoided.

Miller v. Clark, 56 Mich. 340.
Reynolds v. McMullen, 55 Mich. 577.

The Supreme Court of Minnesota have also decided under a similar statute, that due recording is a condition precedent to foreclosure by advertisement.

Troup v. Merrill, 21 Minn. 337-8.

Ross v. Worthington, 11 Minn. 443.

See also Hayes v. Loenlocker, 48 Wis. 510.

Hayes v. Frey et al. 54 Wis. 512.

Wells v. Wells, 47 Barb. 416.

Taeat v. Pierce, 53 Maine, 15.

a

The agreement, dated November 29th, 1848, was a part of the mortgage, was never recorded; its terms and conditions are unknown; their importance in the mortgage cannot be doubted; if one important part of the mortgage could be left unrecorded, then two or three important parts could be left unrecorded and the statute could be easily avoided. The reeording mentioned in this statute certainly meant copying, and that an imperfect copy is no copy, has been directly decided by the Supreme Court of Michigan.

Doyle v. Misner, 42 Mich. 338.

Of like effect is Smith v. Carrington, 4 Cranch 70.

As to strictness with which laws requiring the recording of instruments must be obeyed.

Basset v. Hathaway, 9 Mich. 31.

Starkweather v. Martin, 28 Mich. 478.

Pope v. Cutler, 34 Mich. 150.

There can be no constructive recording.

Sheldon v. Warner, 45 Mich. 638-641.

Sinclair v. Slawson, 44 Mich. 125.

Gales' Executors v. Morris, 29 N. J. Eq. 226.

Farmers' and Mechanics' Bank, v. Bronson, 14 Mich. 371.

Peck v. Mallams, 16 N. Y. 519-520.

Full effect in every way must be given to the to the agreement, dated Nov. 29, 1848, as a part of the mortgage.

Jacobs v. Miller, 50 Mich. 127.

Therefore the omission to copy said agreement on the record was a failure to give it any effect in recording and the record was no better than that in

Basset v. Hathaway, 9 Mich. 31.

The strict enforcement of statutes requiring the recording of chattel mortgages by copying at large or by filing, appears in

To come next after line 9, p. 34:

Of no importance in this suit are many decisions concerning the execution of mortgage powers of sale not governed by statute, or governed by statutes such as those of Massachusetts or the early statutes of New York, differing widely from those of Michigan.

difference; it declares that the bond was a *collateral security*, and of course merely a personal security, but it declares of the agreement dated November 29th, 1848, "that the same in all its terms and conditions is adopted and made part of this mortgage." Had there been added to these words, "and the same is hereunto annexed as a part of this mortgage," there could be no reasonable doubt that the record would have been fatally defective in omitting the agreement; but the meaning of the words in the mortgage is just the same without the supposed additional words as it would be with them. The agreement is made a part of the mortgage and it could have been no more than a part of it had it been thereunto annexed. It was certainly within the power of the contracting parties to write the mortgage on two separate papers and to name one the mortgage and the other the agreement. They might have the mortgage declare that the agreement was a part thereof, and then in the mortgage refer to the agreement for the entire description of mortgaged premises and the entire statement of the mort-

gaged debt, and entirely omitted the mortgage. The paper named the mortgage might be recorded and the paper named the agreement left unrecorded, but there could be no reasonable claim that such recording would be sufficient under the statute for foreclosure by advertisement. If the paper named the mortgage should refer to the paper named the agreement for terms and conditions deemed so important by the contracting parties that the entire agreement is adopted and made part of the mortgage, the failure to record this agreement would leave the record no less defective than that in Bassett v. Hathaway, 9 Mich. 31.

If the parties have deemed these terms and conditions so important that they are made part of the mortgage, it would be unreasonable to declare them immaterial. It is evident that the agreement dated November 29th, 1848, may have been a land contract for the sale of the mortgaged premises, and may have provided for the particulars of the deed to be given and of the purchase money mortgage, Exhibit 2, and may have explained whatever is left unexplained in said mortgage and the explanation may have shown that the words, "time above limited," in the mortgage, prohibited the execution of the power of sale until after the last day for paying the one thousand dollars, as provided in the reservation. If the terms and conditions of the agreement showed any such thing they could not be immaterial. It is evident that the terms and conditions of the agreement may have been most important to the contracting parties and also to any bidder at a statutory sale under the power contained in the mortgage.

These terms and conditions may have even limited the estate which any purchaser might take at such sale and may have declared that such estate should be for life or a term of years.

That no person could safely bid at the mortgage sale March 15th, 1853, without any record evidence

of the terms and conditions adopted into and made part of the mortgage under which the sale was made, is very plain; and it is also very plain that the statute was intended to give bidders at mortgage sales, record evidence of the terms and conditions of every mortgage to be foreclosed by advertisement. The statute was also intended to give to every party interested in the sale, and to all who might be at the sale, record evidence of the terms and conditions of the mortgage. The paper, called the mortgage, was recorded, and the record showed that the terms and conditions of the agreement dated November 29th, 1848, were just as much terms and conditions of the mortgage as any others could be, but were left unrecorded; the record therefore showed that the power of sale never became operative and it is not strange that the mortgagee was left to become the purchaser. If the omission in the record of the terms and conditions in the mortgage can be held immaterial in this case, then there is no reason why an omission of the two weeks in the twelve weeks publication might not be held immaterial; so the failure to record the entire mortgage might be held immaterial if such mortgage was well known to its parties, and the mortgage was recorded afterwards. The statute has the words, "Duly recorded," fixing a condition precedent to any notice of mortgage sale, and it would be absurd to say that any mortgage is duly *recorded when its conditions are left unrecorded.* There was good and sufficient reason for the law requiring that any mortgage to be foreclosed by advertisement must first be duly recorded. The law meant to prohibit ex parte foreclosure sales under mortgages, kept unseen by the mortgagee or his assigns; the law meant to assure the mortgagor, and to any stranger desiring to bid at the sale, a right to inspect the whole contents of the duly recorded mortgage.

Thorp v. Merrill, 21 Minn., 337.
Reynolds v. McMullen, 55 Mich., 576-7.

The finding states that the mortgage was recorded, but also states just how and on what pages of the public record it was recorded. The paper, designated the mortgage, was recorded, but the agreement, dated November 29th, 1848, was never recorded. The statement that the mortgage was recorded is explained so as to express truth and not untruth.

VII.

VARIOUS ALLEGED ESTOPPELS.

There stand in the common law record, in this case now here, the stipulation (7-21) the mortgage, Exhibit 2 (79-82), presented pursuant to paragraph 11 of said stipulation and finding (115-121), all ready for examination here.

Allen v. St. Louis Bank, 120 U. S., 30.

These writings show, directly and affirmatively, the facts and truths, proving that the foreclosure by advertisement was illegal; nevertheless, the defendant in error claims that these same writings contain estoppels to prevent shis Court from examining, considering or deciding upon the said facts and truths. This claim is contrary to elementary law against suppression of the truth. Bigelow on estoppel, 4 Ed., 359.

"Another qualification is that if the truth plainly appears on the face of the deed, there is, gonerally speaking, no estoppel."

Also on page 365, "An estoppel should be certain to every extent." To like effect, Russel v. Placr, 94 U. S., 610.

A.

There is nothing in the stipulation which can suppress any truth appearing therein, or appearing in the finding. The stipulation says that the power of sale is in the mortgage, but refers to the mortgage as recorded "in the office of the Register of Deeds of the county of Berrien, on the 11th day of May, 1849, in liber E of mortgages, at pages fifty-one fifty-two (7), and further provides in section eleven, that either party may introduce in evidence the original mortgage; therefore, the stipulation brings in every word of the mortgage as recorded. Either party, by a certified copy from this record, might show its contents exactly. The stipulation shows affirmatively that the power of sale mentioned and the proceeding thereunder, and the sheriff's deed thereby produced, could never be operative except as authorized by the mortgage and the statute referred to in the mortgage, could never be operative in defiance of the special reservation in the mortgage The stipulation, in paragraph seven, refers to the to the sheriff's deed as recorded May 10th, 1855, on page 401, in liber Z, in said Register's office," thus showing exactly what the deed was; and the stipulation plainly shows all that could, if possible, make the deed operative; one party to the stipulation was contending that the deed was valid; the other party was contending that it was invalid; the words, "became operative." are used for convenience in designation of a part of the subject matter, and in reference to the known truth that the deed *de jacto* became operative, as is shown by paragraph eight of the stipulation: "That, therefore, on or about the first day of April, 1855, said Anna H. Dickson took possession of said premises and continued to hold possession thereof till on or about April 11th, 1855, when she sold and conveyed the same to Malcolm Crofoot, by warranty deed, who went into possession thereof."

The stipulation speaks of the sale and the sheriff's deed without using the words "alleged" or "formal," because the sale and the deed did have a *de facto* existence, and were referred to according to this de facto nature, which was consistent with all that could be claimed as to the defects in the publication and as to the want of authority. The stipulation was not intended to exclude any effect of the notice as it was or of the mortgage as it was. The stipulation says that the mortgage was recorded, but by due reference to the public record, shows exactly what was the recording mentioned. The finding states (120) that this recording did not include the agreegreement of November 29th, 1848; that this agreement was never recorded, neither party to the stipulation could have ever supposed that it was, because the record, duly referred to and made part of the stipulation, showed that it was not recorded. The recording mentioned in the stipulation is limited to what the record, at the place referred to, showed; certainly it does not declare the existence of any recording which had no existence. The stipulation has the words, (16) "Took proceedings to foreclose said mortgage under and by virtue of the power of sale therein contained," but provides (20) that the mortgage may show the nature of the power of sale and states just what the proceedings were; a mortgage sale is mentioned in the stipulation, but the validity of the sale is not conceded; the nature of the sale fully appears by the facts set forth in the stipulation and the mortgage referred to. The stipulation mentions the sheriff's deed, but the validity of the deed is not conceded. The nature of the proceedings on which the deed depends is duly made to appear. The words "operative" and "recorded" are used in the stipulation, but neither the District Judge nor the parties litigant ever supposed that the word "legally" was to be deemed interpolated before either of them. Neither party to the stipu-

lation could have intended that in giving a narrative of actual occurrences, and in mentioning the notice, sale and deed as they happened to exist, it was necessary to say that no more than their apparent existence was conceded; to concede to them legal existence, would have been inconsistent with the whole intent of the stipulation, which was manifestly that the controversy as to their legality might be decided by the Court.

The stipulation was to prepare for a fair trial of the question, not render the trial unnecessary. The stipulation did not strike out from the mortgage the special reservation, and did not put out of the case, the defects in the publication of the notice. The stipulation, by its first four lines, was limited to facts, such as evidence might prove. The question, whether or not the proceedings were authorized by the mortgage and statute, and whether or not the sheriff's deed ever became operative to transfer title to land, were questions of law. The plain intent of the stipulation was that these questions were to be passed upon by the Court; it did not and it could not prevent the Court from deciding these questions. The Circuit Court did decide them and its findings are here for review.

The Circuit Judge states in his finding that the mortgage was reco ded, but he does not intend to state what he immediately afterwards declares to be untrue. The sense in which he uses the word recorded, in saying that the mortgage was recorded, is beyond doubt, limited to the truth and consistent with the truth stated immediately afterwards. The stipulation referred to in the finding states that the mortgage executed and delivered May 8th, 1849, was recorded but does not state or mean that the agreement referred to in the mortgage was ever recorded. The truth was apparent of record, and the word "recorded" here in the stipulation is used in a sense consistent with the well known truth, ex-

actly in the same sense that the Circuit Judge, on reading the stipulation and hearing the proofs and arguments at the trial, used this word without objection in the finding.

B.

The defendant in error makes claim that the plaintiffs in error are estopped from setting up any defense in matter of law under the reservation in the mortgage, because of the words in the stipulation as follows:

"That on or before the 18th day of December A. D. 1852, default had been made by Solyman Waterman in the payment of money due upon said mortgage, and that on the 18th day of December, 1852, there was due and unpaid on said mortgage the sum of $664.50."

Here the word "due" in both places refers to default in the payment of money mentioned in the same sentence, and does not refer in any manner to any default in the payment of the one thousand dollars with the bond and mortgage within the time so limited that it would not expire till long after December, 1852. The stipulation simply states that in December, 1852, certain money installments were past due and unpaid. This made just such an occasion as would give the mortgagor the benefit of the reservation and make the case to which it would apply. The stipulation stops with stating 'that the sum of money was due and unpaid in December, 1852.'"

There is nothing here to estop any person interested from showing the reservation appearing in the mortgage and assuring to the mortgagor the continuing right to pay this sum with the bond and mortgage up to the time for the last installment. There is nothing here to show that because this sum was due in December, 1852, it was not afterwards within the effect of the reservation, and the mortgagor would not afterwards have the right at any time before the time for the last installment to pay this

sum with the bond and mortgage. Certainly the reservation could apply to money payments past due. This would be its most probable application.

The stipulation does not strike out of the mortgage the reservation, nor does it strike out of the case the power of this reservation to continue all rights thereunder until the last day before the time for the last installment, among which in chief was the right to pay with the bond and mortgage and thereby prevent the power of sale from being operative in March, 1853.

The meaning of the word "due," as applied to the installments unpaid in December, 1853, is explained by the mortgage itself, which fixed the pay days for these installments at times prior to December, 1852, and nevertheless gave the mortgagor the full benefit of the reservation as applicable to money payments, due and unpaid. The stipulation says nothing abont the reservation, and as to this it leaves the parties free to show the truth in matters of fact or in matters of law. The eleventh paragraph of the stipulation is "Either party, on any trial of the cause, may introduce in evidence the original bond, mortgage and sheriff's deed, with the endorsements on the deed." The finding has the words, "Reference is hereby made to the original mortgage, marked defendant's Exhibit 2, introduced in evidence by the defendants and filed in the cause for the contents therof."

The defendants in the Circuit Court availed themselves of the rights assured to them by the stipulation to put every part of the mortgage in evidence, and consequently have the full effect in evidence of the reservation; such effect must be to assure to the mortgagor the right, continuing long after March 15, 1853, to pay with the bond and mortgage all of the money claimed in the notice, and this right could not be cut off beforehand or foreclosed in advance by the sale on March, 1853, or thereby im-

paired. Ferris v. Wilcox, 51 Mich., 107. The finding shows that the reservation is here duly before this Court to have all the effect it can have.

The stipulation (19) has the words, "That said premises were not redeemed within the time limited by law for such redemption."

The finding (116) has the words, "Upon said foreclosure the premises were bid off by the mortgagee for six hundred and eighty-four dollars and eighty cents. The time for redemption expired without any one redeeming."

The statutory redemption from the sale, and no other, is spoken of. No non-redemption or non-payment of the mortgage on general principles, and no failure to make special redemption with the bond and mortgage, according to the reservation for special redemption from the mortgage, is referred to. The words, "Limited by law," in the stipulation, and "Time for redemption expired," in the finding, plainly show that statutory redemption is referred to. There was no expiration of any time limited by law for any other kind of redemption.

There is nothing anywhere in the record to show that the mortgagor made any default in tendering or delivering the bond and mortgage mentioned in the reservation within the time thereby limited or otherwise. If any such default actually existed it could no no more than give to the mortgagee a right to foreclose thereafter. It could have no retroactive effect to validate an advertisement and sale, invalid when made.

D.

The first four lines of the stipulation was, "in this cause it is stipulated by and between the parties that the facts hereinafter stated are admitted to be true and may be read *in evidence* on any trial of this cause without further evidence thereof."

The entire effect of the stipulation is limited to facts such as were to appear on trial by *evidence*.

This stipulation admits no conclusions of law; does not estop any party from showing the truth as to any matter of law, or as to any thing other than the facts referred to in the paragraph. Neither party to this stipulation by any theory, by any legal opinion or conclusion contained in the stipulation, is estopped from insisting on the legal truth.

Wilson v. Gaines, 103 U. S. 417.
L. & N. R. R. Co. v. Palmes, 109 U. S. 253.
Pullman Car Co. v. Missouri Pacific Co., 115 U. S. 596.
Town of South Ottowa v. Perkins, 94 U. S. 267.
Rice v. Ruddiman, 10 Mich., 137-8.

No admission in the stipulation as to the construction or legal effect of any writing can create any estoppel to suppress the truth.

United States v. Ames, 99 U. S. 45.
Wilson v. Gaines, 103 U. S. 417.
Dillon v. Barnard, 21 Wall. 430.
Thayer v. Arnold, 32 Mich. 341.
Ormsby v. Barr, 22 Mich. 83.
King v. Carpenter, 37 Mich. 366.
Geney v. Maynard, 44 Mich. 580.

In Goodell v. Smith, 9 Cush. 594, the Court says: "The agreement between these parties being in writing, the admissions of the defendant as to its effect were rightly rejected. If they varied its terms they were not competent. If they did not they were immaterial."

No statement of facts can have greater effect than the statement in a special verdict or finding by the Court. This Court has held that even in statements

of matters of mixed law and fact, all conclusions of law may be disregarded.

French v. Edwards, 21 Wall. 150-151.
Graham v. Bayne, 18 How. 60.
Stimpson v. B. & S. R. R. Co., 10 How. 329.

G.

The statute of Michigan, in force when the mortgage, Exhibit 2, was made and when its foreclosure was attempted, was then and for many years thereafter, so construed in well known decisions of the Supreme Court of Michigan, that Solyman Waterman might well believe that the foreclosure by advertisement was a nullity and that the rents and profits of the mortgaged premises, justly chargeable to those in possession, were paying his mortgage.

There could be no reasonable doubt under these decisions that the notice of the mortgage sale must be signed by the party giving such notice, or as in this case, signed with another person's name, must be void. The finding shows that the notice of mortgage sale, in the last six of the twelve publications required by law, had the named signed thereto changed from "Dickson" to "Dickens," thus appearing to be given by a person other than the mortgagee; by a stranger to the mortgage; and in the last five publications the word "mortgage" instead of "mortgagee" followed the signature, which to have any intelligible connection with the following word, might seem to be in the possessive case.

The statute peremptorily required that the notice should specify the date of the mortgage and the notice did in the first line untruly state the date to be "the eighth day of May, 1848," the last words of the notice being, "On the *bond* in said mortgage mentioned, dated May 8th, 1849."

The statute required that the time of publication should not be less than eighty-four days; to all or-

dinary readers of the notice, after its first two publications, the notice by its date, December 28, 1852, (17-118) showed that it was December 28th, 1852, only seventy-seven days before the day of sale, March 15, 1852.

Section 2 of the statute begins with the words, "To entitle any *party* to give a notice as hereinafter prescribed."

In Niles v. Ransford, I Manning (Mich.) 342, the Supreme Court of Michigan, in January, 1849, decided that the notice must be duly signed. The decisive words are these:

"It is urged that the notice of sale is *not required by statute to be signed by any one*, but no conception can be formed of a legal notice which does not disclose on its face that it emanates from some person or court having the power to act in the manner indicated in the notice. It is this that gives to it its force—that makes it a notice."

See also Miller v. Hall, 4 Denio, 107.
Treat v. River, 53 Maine, 71.
Olcott v. Robinson, 20 Barb. 148.
Burnet v. Denniston, 5 John. Ch. Rep. 35.
Hayes v. Loenlocker, 48 Wis. 510.
Abbott v. Bonfield, 43 New Hamp. 155.

The statute under consideration in Niles v. Ransford above cited, as to the matter of signature was the same as that governing the foreclosure now here in question. Its words are these: "Whenever any peason shall be desirous of foreclosing, by adve. tisement, any mortgage, notice shall be given in which shall be stated the names of the mortgagor and mortgagee, the date of the mortgage, and when recorded, the amount claimed to be due thereon at the date of said notice, and a description of the premises as contained in the mortgage." Revised Statutes of Michigan for 1833, sec. 6, page 285.

In Lee v. Mason, 10 Mich., 405, the Supreme Court of Michigan in 1862, construing the same statute now here in question, gave its unanimous opinion as follows:

"As this case does not show a compliance with the statute the foreclosure cannot be regarded as complete. The statutory proceeding *ex parte*, must *conform in all respects to the conditions expressed by the legislature.*"

This was no more than what appeared in Kent's Commentaries as expla ned in

Roch v. Farnsworth, 106 Mass. 509.

To like effect,

Jones on Mortgages, sections 1822 and 1843 and cases there cited.

Also, Shillaber v. Robinson, 97 U. S. 77, referring with approval to the brief on page 74.

Chicago v. Vincennes R.R. Co. v. Fosdick, 106 U. S. 71.

K.

If long after the alleged foreclosure by advertisement, the Supreme Court of Michigan has decided that no signature to the notice was necessary, or that no strictness of compliance with the statute was necessary, no rights of Solyman Waterman under the prior decisions could be taken away by these changes in the law of the land. He is entitled to all his rights under the law as it was when his rights accrued. No change of law by decisions of Court had any more effect on such rights than would a change of law by amendment of the statute.

Anderson v. Santa Anna, 116 U. S. 362.

2.

The mortgage, in express terms, requires by its words, (18), "Pursuant to the statute in such case made and provided," that any foreclosure proceedings must conform to the statute, and Solyman Wa-

terman had vested rights in the remedy as well as in any other part of the contract.

Walker v. Whitehead, 16 Wall. 314-317.
Cargill v. Power, Manning (Mich.) 369.
Brine v. Ins. Co., 96 U. S. 627.
Louisiana v. New Orleans, 102 U. S. 203.

In Grover v. Fox, 36 Mich., 466, the Supreme Court of Michigan held a foreclosure by advertisement to be void because the acknowledgment to the sheriff's deed by mistake was ante-dated.

In the last two lines of the notice of mortgage sale (17-118), the past participles, "mentioned" and "dated," refer to the same noun, the "bond." The word "dated" cannot be made to refer to the mortgage by grammatical rule or by any apparent meaning.

This can only be accomplished in direct contradiction to the language of the notice, so, as by use of extrinsic evidence and inferences, to strike out the positive statement of the date in the first lines and then interpolate new words, to make the word "dated" refer to the mortgage.

In Lee v. Clary, 38 Mich., 223, decided January, 1878, the Supreme Court of Michigan decide that a statutory foreclosure sale was invalid and gave no right of possession, because it gave the name of the mortgagee as Emma Livermore when the true name was Ermina Livermore, as appears by record of the mortgage duly referred to in the advertisement of sale, thus deciding that no reference to the record could cure the defect, and of course that no reference to the record could cure a false statement of the date of the mortgage. At page 228 the decision says, "The statute is now the only measure of power."

See also Bacon v. Kennedy, 56 Mich. 329.

The questions, whether or not the advertisement of mortgage sale showed that the mortgage dated May 8th, 1849, whether or not it purported to be given by the mortgagee, while it had the signature of another person; whether or not, after December 28th, 1852, it purported by its date to have originated too near its sale day, were questions concerning the construction of this advertisement as open to free consideration here, as the questions concerning the construction of the mortgage or other writings. No state court decision can prevent such consideration here.

Vicksburg & R. R. Co. v. Dennis, 116 U. S. 667.

Louisville & N. R. R. Co. v. Palmes, 109 U. S. 256.

Enfield v. Jordan, 119 U. S. 694.

Carpenter v. Prov. W. Ins. Co. 16 Pet., p. 495.

Olcott v. Supervisors, 16 Wall. 678.

Town of Venice v. Murdock, 92 U. S. 501.

Bargess v. Seligman, 107 U. S. 33-34.

VIII.

ALLEGED EQUITIES OF DEFENDANT IN ERROR.

There is no finding that the defendant in error or any person in its chain of title, was a *bona fide* purchaser, and there could be no *bona fide* purchaser. There is no finding that any printers' affidavit was ever recorded; if any such affidavit ever existed it must be presumed to have been honest and to have described the publication as it really was.

The same record under which the defendant in error claims title shows that Solyman Waterman's

title was never taken from him by the alleged foreclosure proceedings that appear.

Jacobs v. Miller, 50 Mich. 126-7.
Fitzhugh v. Barnhard, 12 Mich. 104.
Mason v. Payne, Walk. Ch. (Mich.) 459.

If the defendant in error has any just claims because of improvements, its claims were in the suit pending in the State court adequately protected by the Laws of Michigan.

Howell's Statutes, sections 7836-7837, from which the following are extracts:

"Whenever in any action of ejectment the plaintiff, or any one or more of the plaintiffs, if there be more than one, shall recover, the defendant or defendants shall be allowed compensation for buildings and improvements on the premises recovered, erected or made by him or them, by any person through he or they claim title." * * "In all actione of ejectment, if any defendant wish to avail himself of the provisions for compensation contained in the last preceding section, he may file a claim in writing to compensation for buildings and improvements on the premises in controversy, setting forth therein the character of the occupation and the time thereof, and that the jury find whether the premises have been actually and peaceably occupied by the defendant, or the person through whom he claims title, and the time of such occupation, and determine the increased value of the premises by reason thereof, a copy of which notice and the fiilng thereof shall be served on the plaintiff or his attorney at least ten days before the the first day of the term at which said cause may be tried. The plaintiff may then file a request in writing that the jury also find and determine what would have been the value of the premises at the time of the trial, if no buildings had been erected or improvements made or waste committed, a true copy of which, with no-

tice of the filing, shall be served on the defendant, or his attorney, at least five days before the first day of the term at which said cause may be tried. The jury, in all cases in which the above matters shall be submitted to them, shall, by their verdict, if they find for the plaintiff, also find and determine upon said matters."

If after the termination of Elgar Reading's possession the opposing party entered into possession and continued to hold such possession pending the suit in the State court, mentioned in the finding, the defendant in error could on obtaining a final judgment in its favor have a writ of possession, or if such possession was wrongfully taken, the Michigan Statute of Forcible Entries and Detainers' furnished prompt remedy.

Howell's Statutes, chapter 286.

The statutes for the removal of causes to the Federal Court were at hand in full force.

If concerning any improvements or possession, the statutes in such case made and provided for any reason, failed to give a plain, adequate and complete redress, the Courts of equity, both State and Federal, were ready to give adequate relief.

The defendant in error could not, by the change of forum, create any equities for itself.

The defendant in error in this action claims equitable relief, because Solyman Waterman, after he commenced his ejectment suit, conveyed for too small a price, but Solyman Waterman makes no complaint, and this matter makes no equity for this defendant in error whose monstrous power in litigation being well known naturally reduced the price.

Howell's Statutes, section 5657:

"No grant or conveyance of lands, or interest therein, shall be void for the reason that at the time of the execution thereof such lands shall be in the actual possession of another claiming adversely."

RECAPITULATION.

1. Insufficiency of finding of facts in certain essentials. Pages 6 to 13, inclusive.

2. That the stipulation and finding in this suit explain all their words of disputed significance by their statement of the facts and writings to which said words refer. Pages 26, 27, 39 to 45, inclusive.

3. That there is, in this case, no estoppel to exclude any evident truth. Pages 14 to 24 and 38 to 45, inclusive.

4. That the power of sale never, prior to the sale March 15, 1853, became legally operative. Pages 25 to 37, inclusive.

5. That the power of sale was never legally executed. Pages 46 to 50, inclusive.

6. The defendant in error can have under the finding no more than an unforeclosed mortgage. Pages 24, 33, 51 52, 44 and 95 1/2 inclusive

EDWARD BACON,
Of Counsel for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED,
JAN 22 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

NO. 173.

LYDIA BACON, DAVID BACON, FRANCIS M. IVES AND JOHN A. MONTAGUE, PLAINTIFFS IN ERROR,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

JOHN E. MORE,
Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

NO. 173.

LYDIA BACON, DAVID BACON, FRANCIS M. IVES AND JOHN A. MONTAGUE, PLAINTIFFS IN ERROR,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an action of ejectment brought by defendant in error to recover lot number twenty-seven (27) of William Justice's Addition to Niles, in Berrien County, Michigan. Defendant in error acquired its title by purchase at a foreclosure sale, duly confirmed and followed by a master's deed. (Record, marginal page 116, 29). The sale was made to satisfy the amount due upon a mortgage made to defendant in error in 1874, by Edgar Reading, to secure the payment of a loan of $10,000. (116). The mortgage was made June 19th, 1874; the foreclosure sale took place October 21st, 1879; and the master's deed was executed October 28th, 1879, and recorded December 31st, 1879. (29–31). When the defendant in error, in the spring of 1880, undertook, with the aid of a writ of assistance, to get the benefit of its purchase, it found certain persons in possession who claimed to hold as tenants of one David Bacon, one of the plaintiffs in error. (115, 36). Upon further inquiry, defendant in error then first learned that a suit in ejectment was, and for twelve years had been pending in the Circuit Court for the County of Berrien, brought by Solyman Waterman against Edgar Reading to recover the premises in question. (101, 32–34). It appears that this David Bacon had also learned of the pendency of this suit and had begun

negotiations to secure from Waterman the claim which Waterman had abandoned years before. These negotiations resulted in his obtaining from Waterman, then residing in California, a quit-claim deed of the property running to his wife, Lydia A. Bacon, for a consideration expressed in the deed to be three hundred dollars. (120–121) The property was then worth from twelve to twenty-five thousand dollars. (115). It seems that the business of buying stale claims affecting titles to real estate was not new to Mr. Bacon. The case of *Hanold v. Bacon*, reported in *36 Mich., 1*, is another instance occurring some years before. In that case, the peculiar business methods of Mr. Bacon are clearly shown by Chief Justice Cooley who delivered the opinion of the court.

When The Northwestern Mutual Life Insurance Co. discovered this suit which had slept so long, it was brought to trial without delay (36).

Upon the trial it appeared that Solyman Waterman was the common source of title; that on May 8th, 1849, he bought the premises from Anna H. Dickson and gave back a mortgage to secure the purchase price, payable in five equal annual instalments with interest quarterly each year; that the mortgage was foreclosed by advertisement and bid in at the sale by Anna H. Dickson, the mortgagee, to whom Waterman, in April, 1855, surrendered possession (101, 37–41). April 11th, 1855, Anna H. Dickson conveyed by warranty deed to Crofoot, who continued in possession until September 20th, 1867, when he sold to Edgar Reading, who entered and continued in the actual possession of the premises until 1876; that when Waterman began his suit in ejectment, Reading had nearly completed a hotel building on the premises at a cost of over thirty thousand dollars (115, 116, 94).

In that action, Waterman relied upon certain alleged irregularities in the foreclosure of the Dickson mortgage. He recovered in the Circuit Court, and defendant in error thereupon removed the case by writ of error to the Supreme Court of the State, where the judgment of the court below was reversed and a new trial ordered. The regularity of the foreclosure of the Dickson mortgage is fully established by the decision of the Supreme Court in that case (101, 46 Mich., 107).

After the determination of that case in the Supreme Court, defendant in error commenced this action in the court below. It was tried before the court without a jury, and defendant in error recovered the judgment, which this court is now asked to review.

ARGUMENT.

The only error assigned in this case is that the judgment is not sup-

ported by the finding of facts filed in the cause by the late Solomon L. Withey, the district judge before whom the cause was tried (126, 127).

To support the judgment, the findings need only show possession by plaintiffs in error and title and right of possession in defendant in error.

Possession by plaintiffs in error was admitted at the trial and is found as a fact by the court.

The court also finds the title in fee in defendant in error, and details the facts which constitute the chain of title from Waterman, the common source.

There being no privity between the parties, the right of possession follows the title.

The only link in the chain of title about which there was any controversy in the court below was the transfer to Anna H. Dickson by foreclosure of the Waterman mortgage.

This was claimed to be fatally defective for the following reasons:

1. The mortgage was not "duly recorded" so as to warrant a foreclosure by advertisement under the power of sale, for the reason that the agreement of November 29th, 1848, which is referred to and in all its terms and conditions adopted and made part of the mortgage, was not recorded.

2. The power of sale contained in the mortgage was not operative between December 1st, 1852, and April 1st, 1853.

3. The foreclosure proceedings were not in accordance with law, were irregular and void, and no title passed from Waterman to the purchaser at the mortgage sale.

These propositions cannot be sustained.

I.

The object of recording laws is to give notice to all persons of all conveyances affecting the title, and "to protect purchasers in good faith for a valuable consideration against prior secret conveyances." *Godfroy v. Disbrow*, *Walk. Ch.*, *260.*

The statutes of Michigan provide that "every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." *How. Stat.*, *Sec. 5683.*

The term "conveyance" includes mortgages.

How. St., §*5689. Burns v. Berry*, *42 Mich.*, *179.*

The statutes also define the way in which the conveyance shall be

recorded. When a mortgage is delivered to the register of deeds he must enter in his entry book of mortgages the date of reception and the location of the land. *How. St.*, §§ *5674*, *5675*, *5676*. He must then record it at full length in the proper book, and index it properly in the general index. *How. St.*, §§ *5676*, *5677*, *5682*.

It was conceded at the trial and is found as a fact by the court that the mortgage executed by Waterman May 8th, 1849, (79) was duly recorded (120, 121). It was contended, however, that the reference in the defeasance clause of the mortgage to the agreement of November 29th, 1848, made it necessary to record that agreement before the mortgage could be said to be duly recorded. As well might it be said that a mortgage is not duly recorded unless the note or bond referred to in the mortgage is also recorded. The statute does not require that such collateral agreements be recorded, nor would there be any reason in such a requirement. A mortgage consists of two parts, the grant or conveyance and the defeasance. These parts are not necessarily contained in one instrument. They may be drawn and executed separately, and in that case the defeasance need not be recorded.

The record of the Waterman mortgage as it was made not only satisfied the terms, but fulfilled the object of the statute. It was notice to all persons of the mortgage lien upon the premises, and anyone desiring information about the agreement of Nov. 29th, 1848, the amount due on the mortgage, or any other matter relating thereto, could have obtained it from the parties.

The mortgage was "duly recorded" within the meaning of the third subdivision of section 8498, Howell's Statutes.

II.

The third paragraph of the stipulation of facts filed in the court below and read at the trial is as follows:

"3rd. That on and before the 18th day of December, A. D. 1852, default had been made by said Solyman Waterman in the payment of money due upon said mortgage, and that on said 18th day of December, 1852, there was due and unpaid on said mortgage the sum of six hundred and sixty-four dollars and fifty cents, and that no proceedings at law had been instituted to recover any part of said debt." (16, 117).

Default having been made, the power of sale was operative on the 18th day of December, 1852, and there is no evidence that it ever ceased to be operative.

III.

The regularity of the foreclosure proceedings cannot be questioned. The finding of the court below upon that subject is as follows:

"12. The Supreme Court of Michigan, in 46 Mich., R. 107, deciding the case, on error to the Circuit Court of Berrien County, of Waterman vs. Reading, held the foreclosure proceedings by Anna H. Dickson, mortgagee, were not so far irregular or defective as to defeat the title of the purchaser at that foreclosure sale, notwithstanding the mistakes in the notice of sale as published.

This court follows the ruling of that tribunal, and finds the notice as published for the foreclosure of the mortgage, made May 8th, 1849, by Solyman Waterman to Anna H. Dickson was legally sufficient, and that the latter acquired a valid title to the premises as purchaser at that sale." (121).

In following the ruling of the Supreme Court of Michigan upon the regularity of the foreclosure proceedings, the court below acted in conformity with the rule laid down by this court at an early period of its history, and consistently and uniformly followed, except in a class of cases to be hereafter mentioned.

McKeen v. Delancy, 5 Cranch, 22.

Elmendorf v. Taylor, 10 Wheat., 152.

Sumner v. Hicks, 2 Black, 532.

South Ottawa v. Perkins, 94 U. S., 260.

Brine v. Insurance Co., 96 U. S., 627.

Connecticut Insurance Co. v. Cushman, 108 U. S., 51.

Equator Co. v. Hall, 106 U. S., 86.

A rule of property not fixed by statute but settled by the repeated and uniform decisions of the Supreme Court of a state will be followed by the United States Court.

Bendey v. Townsend, 109 U. S., 665.

The exceptions to this rule are confined to cases where one construction of a statute has been adopted by a state and rights have accrued under and in reliance upon that construction, and subsequently a different construction is adopted, as in *Taylor v. Ypsilanti, 105 U. S., 60, Douglas v. County of Pike, 101 U. S., 677*, and similar cases, or where the question is one to be determined upon the general principles of the common law, as in *Railroad Co. v. National B'k, 102 U. S., 14*, and similar cases.

The case at bar does not come within the exceptions. No different construction of the statute has ever prevailed in Michigan. The Supreme Court of Michigan has repeatedly held that in statutory foreclosures, the requirements of the law must be substantially complied with.

Niles v. Ransford, 1 Mann. Mich., 338, 341-2.

Lee v. Mason, *10 Mich.*, *403.*
Doyle v. Howard, *16 Mich.*, *261.*
Sanford v. Flint, *24 Mich.*, *26.*
Dodge v. Brewer, *31 Mich.*, *227.*
Grover v. Fox, *36 Mich.*, *461*, *466.*
Lee v. Clary, *38 Mich.*, *223.*
Mich. State Ins. Co. v. Soule, *51 Mich.*, *312.*
Miller v. Clark, *56 Mich.*, *337.*

In *Niles v. Ransford*, the mortgagee, after commencing the publication of notice of sale, assigned the mortgage. The publication was continued without change, and the property was sold in pursuance of the notice. The court held the sale bad for the reason that after the assignment the notice did not contain the name of the assignee. The notice should have been republished in his name.

In *Lee v. Mason*, the mortgaged land consisted of several parcels, some of which were not adjoining. The sheriff's deed on foreclosure conveyed all the parcels for one sum named as the purchase price. The sale was held bad for the reason that the statute required the land to be sold in parcels, and gave the mortgagor the right to redeem any parcel.

In *Doyle v. Howard*, it was held that a failure to execute and deposit the deed or any affidavit of the facts of the sale with the register of deeds until after the expiration of one year from the time of sale rendered the foreclosure and sale invalid.

Sanford v. Flint, was a bill to redeem from a sale upon a statutory foreclosure after the time limited by law for redemption had expired, and the court allowed the mortgagor to redeem for the reason that the mortgagee claimed more than was found to be due and sold the land for a sum largely in excess of the amount due.

In *Dodge v. Brewer*, no question arose about the regularity of the statutory foreclosure, but it was held to have been superseded and annulled by agreement between the parties subsequent to the sale.

In *Grover v. Fox*, a sheriff's deed upon a statutory foreclosure failed to show that the land had been sold in parcels, and ten months later a new deed was filed showing a sale in parcels dated back to the time of sale, with a false certificate of acknowledgment of same date. For this reason, and for the further reason that the mortgagee claimed, and sold the land for, more than was due, the foreclosure proceedings were held void.

In *Lee v. Clary*, the notice of sale, in which the mortgage, otherwise correctly described, was set forth as made by *Emma* Livermore, when in fact it was made by *Ermina* Livermore, was held invalid for the reason that the statute requires the notice to give the name of the mortgagor. It was further objected to the notice that it did not show the fact of the commencement and discontinuance of previous foreclosure proceedings; also that it did not show the hour and minute of the day when the mortgage was recorded.

These objections were overruled. The court, by Campbell, Chief Justice, say:

"The notice is required to contain four elements: 1, the names of the parties to the mortgage and assignees; 2, the date and when recorded; 3, the amount claimed to be due; 4, a description of the mortgaged premises. These all identify the instrument and show the extent of the claims of the party foreclosing, and indicate to persons interested what rights are set up. This is all that they need to be informed of to protect themselves. * * * We cannot add to the requirements of the statute and hold a notice void for not asserting or containing what that does not require."

Upon the construction of this statute the court say:

"It seems to be imagined that statutory foreclosures are to be treated as subject to the same stringent rules that apply to proceedings *in invitum* contrary to the course of the common law, and that intendments are to be made against them. No doubt every statutory requirement must be adhered to, but these are sales by contract where the proceeding is authorized by the mortgagor himself to save the expense and trouble of proceedings in equity. Such titles would be worthless if any unreasonable restrictions were laid on them, and the mortgagor would in most cases find it difficult to obtain money on fair terms without some assurance that the enforcement of the security would not be troublesome. No substantial right should be destroyed, and no statutory requirement can be overlooked. But all provisions must be reasonably construed."

In *Mich. State Ins. Co. v. Soule*, the notice of sale was objected to as fatally defective because it was signed "Michigan State Insurance Company" instead of "*The* Michigan State Insurance Company," which is the corporate name. Justice Cooley, delivering the opinion of the court, says:

"This last very technical objection we pass by with the simple remark that the statute does not require the party foreclosing to sign his name to the notice; it is sufficient if the name is specified therein. (Comp. L., § 6915.) We are not informed that it was not."

In *Miller v. Clark*, it was held that a guardian of infants could not foreclose by advertisement, a mortgage, the legal title to which was in the administrator of the father's estate.

From this brief review of the Michigan cases it will be noted that there is no case in conflict with the rule laid down in *Reading vs. Waterman.*

In the court below it was contended that the ruling in *Reading vs. Waterman* should not be followed because the Supreme Court of Michigan overlooked the fact that the signature to the notice of sale was for several weeks printed "Anna H. *Dickens* instead of *Dickson*; that these names are not *idem sonans.* In the light of the decision in *Mich. State Ins. Co. vs. Soule*, it is not probable that this fact was overlooked. "The statute does not require the party foreclosing to sign his name to the notice."

There is still another reason why the ruling in *Reading vs. Waterman* should be followed in the case at bar, and that is that the matter in issue is *res adjudicata.*

It is a settled rule of law that a fact or controversy once decided by a competent tribunal cannot be re-examined by another court of concurrent jurisdiction in a suit between the same parties or their privies.

Bank of U. S. v. Beverly, 1 How., 134, 148.
Aspden v. Nixon, 4 How., 467, 497.
Hopkins v. Lee, 6 Wheat., 109.
Lessee of Parrish v. Ferris, 2 Black, 606.
Wilson's Executor v. Deen, 121 U. S., 525.

The case of *Lessee of Parrish v. Ferris* is directly in point upon this question. That was an action of ejectment. Defendants pleaded in bar a previous suit between the same parties in the courts of the State of Ohio, in which a judgment or decree was rendered in their favor. The plea was held good, and Mr. Justice Nelson for the court says:

"This court acknowledges the rule and has uniformly applied it, of the conclusiveness of a judgment of a court of concurrent jurisdiction between the same parties or their privies upon the same question."

In the case at bar, the parties are privies in title of the parties in *Reading v. Waterman*, plaintiffs in error being the grantees of Waterman, and defendant in error holding title from Reading. The courts of Michigan had concurrent jurisdiction, and the matter in issue in each case was the same, viz: the validity of the title acquired by Anna H. Dickson upon the foreclosure of the Waterman mortgage.

It was contended, however, that the matter in issue was not *res adjudicata*, for the reason that a new trial was ordered in *Reading v. Waterman*, and that therefore the suit is not finally determined.

The only matter in issue was the validity of the forelosure of the Waterman mortgage, and that was finally and conclusively determined by the Supreme Court in that case. It certainly cannot be presumed that that court would change its ruling, should the case be again brought before it.

In the case of *Mynning vs. Detroit etc., R. Co., 35 N. W. Rep., 811* decided by the Supreme Court of Michigan January 5th, 1888, it was held that when that court has declared the law of a case, the rule of law laid down remains the law to be applied upon the same state of facts in all the subsequent proceedings in the cause.

This contention cannot prevent the application of the doctrine of *res adjudicata* to the case at bar.

The case of plaintiffs in error is wholly without merit. There is no phase of it which can appeal to the conscience of the court to modify or soften the strict rules of law which, under ordinary circumstances, would govern in its determination.

Their claim is not entitled to favorable consideration.

After the foreclosure sale, and after the time for redemption had expired, Waterman surrendered posession of the mortgaged lands to Anna H. Dickson, the purchaser on the foreclosure sale. After Reading had bought the lot and built an expensive hotel upon it, and more than five years after Waterman had surrendered possession, he commenced his suit in ejectment. He did not offer to redeem, nor has he or any of his successors in title ever offered to redeem. He never prosecuted his suit and finally abandoned it and removed to California.

He had so little confidence in his claim that he sold it for three hundred dollars to Lydia Bacon, the wife of David Bacon, dealer in stale claims. He invested that sum in a law suit, hoping to get title to property worth from twelve to twenty-five thousand dollars. He ought not to succeed.

On the other hand, defendant in error loaned ten thousand dollars upon the property, foreclosed its mortgage and was compelled to take the property. For nearly nine years it has been deprived of the beneficial use of the property by the plaintiffs in error. This wrong has been borne long enough.

The judgment should be affirmed.

JOHN E. MORE,
Attorney for Defendant in Error.

131-280

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1552.

EX PARTE: IN THE MATTER OF THOMAS J. CUDDY, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED APRIL 22, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 22, 1889.

box and the jurors sworn on "*voir dire.*" Caspar Behrendt was challenged by the United States attorney and excused.

Upon examination of juror Robert McGarvin by Geo. J. Denis, Esq., United States attorney, he was asked, among other things, if he had been approached or spoken to by any one in reference to this case, and said McGarvin replied that he had been approached and spoken to in reference thereto by Thomas J. Cuddy. On motion of the United States attorney, and by consent of counsel for defense, all of the jurors except juror Robert McGarvin were ordered to retire in the custody of the marshal while the further examination of Juror McGarvin was being had. The examination was then concluded. The said juror was challenged by defense and excused.

Whereupon, it appearing from the testimony of the juror, Robert McGarvin, that he had been approached by one Thomas J. Cuddy with the object on Cuddy's part to influence said McGarvin's actions as a juror in the action now on trial before this court, wherein The United States of America is plaintiff and W. More Young defendant, it is now ordered, upon the testimony so as above adduced, that the said Thomas J. Cuddy appear before this court on February 13, 1889, at ten o'clock a. m., then and there to show cause why he should not be punished for contempt, and the clerk of this court is hereby directed to issue a citation forthwith, citing said Thomas J. Cuddy to appear and show cause as aforesaid.

And it is further ordered that a subpœna issue forthwith for Robert McGarvin and D. C. McGavin, returnable on February 13th, 1889, at 10 o'clock a. m.

4 *Minute Entry.*

In the District Court of the United States of America for the Southern District of California.

Wednesday, February 13th, 1889; January term, A. D. 1889.

Present: Hon. E. M. Ross, district judge.

In the Matter of the Contempt of THOMAS J. CUDDY. 105.

Defendant and respondent present in court, accompanied by his counsel, Thomas B. Brown, Esq., Geo. J. Denis, Esq., United States attorney, appearing on behalf of the Government.

This matter coming on regularly for hearing, and the marshal having made return on the citation and order to show cause herein before issued, W. D. Grady, Esq., counsel for the defendant in the case of The United States *vs.* W. More Young, moves the court for a continuance, and the motion is denied.

Thereupon an exception to the proceedings was taken by Thomas B. Brown, Esq., counsel for respondent, a general denial entered, and the hearing was proceeded with.

Robert McGarvin and D. C. McGarvin duly sworn and testified as witnesses on the part of the Government. Motion by
5 counsel for respondent to dismiss the matter of contempt denied.

F. H. Longley, stenographer, duly sworn to take the testimony in short-hand, and proceeded to take and did take the testimony thereupon adduced in short-hand.

Thomas J. Cuddy, the respondent, is duly sworn and testifies in his own behalf; whereupon, there being no further testimony, argument is had, the matter submitted, and the court renders its decision as follows:

Whereas, in the progress of the trial of the action of The United States of America *vs.* W. More Young, on the 12th day of February, 1889, upon the examination of the term trial juror, Robert McGarvin, as to his qualification to sit as a trial juror in the said action, the said McGarvin testified, among other things, in effect that on the day previous he was approached by one Thomas J. Cuddy with the object on Cuddy's part to influence his, McGarvin's, actions as a juror in the said case in the event that he should be sworn to try the said action; and

Whereas from the testimony this court, on the said 12th day of February, 1889, entered an order directing the said Thomas J. Cuddy to show cause before this court, at the court-room thereof, at 10 o'clock, on the 13th day of February, 1889, why he should not be adjudged guilty of the contempt of this court; and

Whereas, in response to the said citation, said Thomas J. Cuddy did, on the said 13th day of February, 1889, appear before the said court; and

Whereas testimony was then and there introduced in respect to the matter both for and against him:

6 The court, having duly considered the testimony, does now find the fact to be that the said Thomas J. Cuddy did, upon the 11th day of February, 1889, approach the said Robert McGavin, at the time being a term trial juror duly impannelled in this court, with the view to improperly influence the said McGarvin's actions in the case of the United States of America against the said Young in the event the said McGarvin should be sworn as a juror in said action.

Now, it is here adjudged by the court that the said Thomas J. Cuddy did thereby commit a contempt of this court, for which contempt it is now here ordered and adjudged that the said Thomas J. Cuddy be imprisoned in the county jail of the county of Los Angeles for the period of six months from this date, and the marshal of this district will execute this judgment forthwith.

Defendant and respondent remanded to the custody of the marshal.

7 The following is a true copy of the citation issued in said matter and served upon the petitioner on the 12th of Feb., 1889, by D. R. Risley, U. S. marshal*l*:

UNITED STATES OF AMERICA,
Southern District of California.

The President of the United States to the marshal of the United States for the southern district of California, Greeting:

Whereas an order has been this day entered by this court that T. J. Cuddy be cited and admonished to appear and show cause why they [he] should not be punished for contempt:

Now, therefore, this is to command you that you cite and admonish the said T. J. Cuddy, if he be found within your district, to be and appear before the Honorable Erskine M. Ross, judge of the United States district court for the southern district of California, at the court-room, in the city of Los Angeles, on Wednesday, the 13th day of Feb'y, 1889, at 10 o'clock a. m., that he may then and there show cause, if any he can, why he should not be punished for contempt, and to do and receive what the said court shall order in the premises.

Witness the Hon. Erskine M. Ross, judge of said court, this 12th day of February, 1889, and of the Independence of the United States the one hundred and 13th.

[Seal of U. S. Dist. Court.]

E. H. OWEN, *Clerk*,
By WM. M. VAN DYKE,
Deputy Clerk.

8 The following is a true copy of the commitment issued in said matter under which petitioner is imprisoned:

9 UNITED STATES OF AMERICA,
Southern District of California, } ss:

The President of the United States to the marshal of the United States for the southern district of California, Greeting:

Whereas, at the January term of the district court of the United States of America for the southern district of California, held at the court-room of said court, in the city and county of Los Angeles, in said district, to wit, on the 13th day of February, A. D. 1889, Thomas J. Cuddy was convicted of a contempt of the said court committed on the 11th day of February, 1889, at the city of Los Angeles, county of Los Angeles, State of California, and within the jurisdiction of said court, contrary to the form of the statutes of the United States in such case made and provided and against the peace and dignity of the said United States;

And whereas, on the 13th day of February, A. D. 1889, being a day in the said term of said court, said Thomas J. Cuddy was, for said contempt of which he stood convicted as aforesaid by the judgment of said court, ordered to be imprisoned in the county jail of the county of Los Angeles for the period of six (6) months from said 13th day of February, 1889:

Now, this is to command you, the said marshal, to take and keep

and safely deliver the said Thomas J. Cuddy into the custody of the keeper or warden or other officer in charge of said county jail of the county of Los Angeles, California, forthwith.

And this is to command you, the said keeper and warden and other officers in charge of the said county jail of the county of Los Angeles, to receive from the United States marshal of said southern district of California the said Thomas J. Cuddy, convicted and sentenced as aforesaid, and him, the said Thomas J. Cuddy, to detain and imprison for the period of six (6) months from said 13th day of February, 1889.

Herein fail not.

Witness the Hon. Erskine M. Ross, judge of the district court of the United States for the southern district of California, and the seal thereof, at Los Angeles, in said district, on the 13th day of February, A. D. 1889.

[SEAL OF COURT.]

E. H. OWEN,
Clerk of said District Court,
By —— ——,
Deputy Clerk.

10 [Endorsed:] No. 105. In the district court of the United States, southern district of California. In the matter of the contempt of court of Thomas J. Cuddy. Commitment. Contempt of court. Issued February 13, 1889. Filed this 13 day of February, 1889. E. H. Owen, clerk, by —— ——, deputy clerk.

The within warrant of commitment was received by me on the 13th day of February, 1889, and is returned executed this 13th day of Feb., 1889.

D. R. RISLEY, *U. S. Marshal,*
By THOMAS B. HAYES, *Deputy.*

11 The foregoing is a full and complete statement of all the proceedings of said court under which petitioner is imprisoned.

And your petitioner claims that said United States district court had no jurisdiction or authority legally to try and sentence him in the manner and form above stated—

1. For the reason that the matters set out in said judgment do not constitute any contempt of court provided for by section 725 of the Revised Statutes of the United States.

2. For the reason that the proceedings in said court were insufficient to give the court jurisdiction to proceed to judgment in said matter.

3. For the reason that said judgment is void, because not based or founded upon any proceedings in due course of law.

Wherefore your petitioner prays that this honorable court do forthwith order the writ of *habeas corpus* to issue from this court to the said D. R. Risley and P. M. Darcey, marshal and warden as aforesaid, requiring them to produce the body of your petitioner

before this court at some time to be designated in said writ, then to abide what shall be awarded by this court.

ANDERSON, FITZGERALD & ANDERSON,
Attorneys for Petitioner, T. J. Cuddy.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

Thomas J. Cuddy makes oath and says that he is the petitioner in the foregoing petition and knows the contents thereof, and that the facts set forth in said petition are true.

T. J. CUDDY.

12 Sworn to and subscribed before me this 10th day of April, 1889.

[SEAL.] WM. M. VAN DYKE,
Clerk U. S. Circuit Court for the Southern District of California,
By E. H. OWEN, *Deputy.*

13 (Endorsed:) 121. Circuit court of the United States, ninth circuit, southern district of California. *In re* Thomas J. Cuddy. Petition for *habeas corpus.* Filed April 10th, 1889. Wm. M. Van Dyke, clerk, by E. H. Owen, deputy clerk. Anderson, Fitzgerald & Anderson, att'ys for petitioner.

14 *In Re* THOMAS J. CUDDY.

Petition for Writ of Habeas Corpus.

Be it remembered that on this 11th day of April, 1889, Thomas J. Cuddy, by his attorneys, Anderson, Fitzgerald & Anderson, presented in open court the petition for the writ of *habeas corpus* to D. R. Risley, marshal, and P. M. Darcy, warden of Los Angeles county jail, heretofore filed in this court; and, the same being heard and considered by the court, it is ordered and adjudged that the prayer of said petitioner be refused and the writ prayed for denied, and that the said petitioner be dismissed, and that the petitioner pay the costs of this proceeding.

ROSS,
District Judge.

15 United States Circuit Court, Ninth Circuit, Southern District of California.

In Re THOMAS J. CUDDY, Petitioner for *Habeas Corpus.*

The above-named petitioner, conceiving himself aggrieved by the final judgment and decision entered on the 11th day of April, 1889, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that his appeal may be allowed, and that a transcript of the record, proceedings,

and papers in the cause, duly authenticated, may be sent to the Supreme Court.

ANDERSON, FITZGERALD & ANDERSON,
Attorneys for Petitioner.

(Endorsed:) Filed Ap'l 11th, 1889. Wm. M. Van Dyke, clerk, by E. H. Owen, deputy.

16 *In Re* THOMAS J. CUDDY.

Petition for Writ of Habeas Corpus.

In this cause, the petitioner having prayed an appeal to the Supreme Court of the United States from the final judgment, this day rendered in this cause, refusing the prayer of the petition and denying the writ prayed for and dismissing the petition, it is ordered and adjudged that the said appeal be allowed upon petitioner entering into a bond, with sufficient sureties, payable to the United States, in the sum of two hundred and fifty dollars, conditioned to prosecute his appeal with effect, or else pay all costs that may accrue.

And it is further ordered that a transcript of the record, proceedings, and papers in this cause, duly authenticated, be sent to the Supreme Court of the United States.

ROSS,
District Judge.

17 UNITED STATES OF AMERICA,
Southern District of California:

Circuit Court.

Know all men by these presents that as [we] Thomas J. Cuddy, as principal, and Chas. F. Webber and Jerry Illich, as sureties, are held and firmly bound unto the United States in the sum of two hundred and fifty dollars, to be paid by the said Thomas J. Cuddy to the United States; to which payment, well and truly to be made, we do bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this 11th day of April, 1889.

Whereas, on the 11th day of April, 1889, the circuit court of the United States, ninth circuit, district of Southern California, in a proceeding in said court, where the said Thomas J. Cuddy filed his petition in said court praying for a writ *habeas corpus* to D. R. Risley, marshal of said district, and to P. M. Darcy, warden of the jail of Los Angeles county, California, the said court entered a final judgment refusing the prayer of said petitioner and denying said writ and dismissing the petition;

And the said Thomas J. Cuddy having prayed and been allowed an appeal from said judgment to the Supreme Court of the United States, now sitting in Washington:

Now, the condition of this obligation is such that if the said Thos. J. Cuddy shall prosecute his appeal to effect and answer all costs if

he shall fail to make good his plea, then the above obligation to be void; otherwise to remain in full force and virtue.

CHARLES F. WEBBER. [SEAL.]
JERRY ILLICH. [SEAL.]

18 UNITED STATES OF AMERICA, } ss:
Southern District of California, }

Charles F. Webber and Jerry Illich, being duly sworn, depose and say, and each for himself saith, that he is worth two hundred and fifty dollars over and above all just debts, liabilities, and exemptions.

CHARLES F. WEBBER.
JERRY ILLICH.

Sworn to and subscribed before me this 11th day of April, 1889.

E. H. OWEN,
[SEAL.] *U. S. Commissioner and Clerk of the U. S. District Court for the Southern District of Cala.*

The form of the foregoing bond and the sufficiency of the sureties thereto is hereby approved.

ROSS,
District Judge.

(Endorsed:) Filed Ap'l 11th, 1889. Wm. M. Van Dyke, clerk, by E. H. Owen, deputy.

19 Circuit Court of the United States, Southern District of California.

In Re THOMAS J. CUDDY, Petitioner for *Habeas Corpus.*

I, George J. Denis, hereby waive all notice of appeal in the above-entitled cause, and all service upon me of citation to appear in the Supreme Court of the United States in the matter of said appeal.

GEORGE J. DENIS,
United States Attorney for Southern District of California.

(Endorsed:) Filed Ap'l 11th, 1889. Wm. M. Van Dyke, clerk, by E. H. Owen, deputy.

20 In the Supreme Court of the United States.

In Re THOMAS J. CUDDY, Petitioner for *Habeas Corpus.*

On appeal.

And now comes the appellant, by his attorneys, and says that in the records and proceedings aforesaid there is manifest error—

1. That the circuit court erred in refusing the prayer of the petitioner and denying petitioner the writ of *habeas corpus*, as prayed for therein.

2. That the circuit court erred in dismissing petitioner's petition.

Wherefore this appellant prays that the said judgment of the circuit court, ninth circuit, district of Southern California aforesaid, may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by occasion of the said judgment, &c.

ANDERSON, FITZGERALD & ANDERSON,
Attorneys for Appellant.

21 UNITED STATES OF AMERICA, }
Southern District of California, } *ss:*

I, Wm. M. Van Dyke, clerk of the circuit court of the United States, ninth circuit, southern district of California, do hereby certify that the above and foregoing are true and correct copies of the petition, final judgment, the prayer for appeal, the order allowing appeal, the appeal bond, and the judge's approval thereof, the waiver of notice of appeal, and of citation to appear by the United States district attorney, and the assignment of errors on said appeal to the Supreme Court of the United States in cause No. 121, The United States of America *vs.* Thomas J. Cuddy, petition for writ of *habeas corpus*, on file in my office.

Witness my hand and the seal of the said circuit court this 12th day of April, A. D. 1889.

[Seal U. S. Circuit Court, Southern Dist. Cal., 1886.]

WM. M. VAN DYKE, *Clerk*,
By E. H. OWEN, *Deputy Clerk.*

22 [Endorsed:] No. 121. In the *U. S.* circuit court of the United States, ninth circuit, southern district of California. The United States of America *vs.* Thomas J. Cuddy. Transcript on appeal to the Supreme Court of the United States from order denying petition for writ of *habeas corpus*.

Endorsed on cover: S. California C. C. U. S. No. 1552. *Ex parte:* In the matter of Thomas J. Cuddy, appellant. Filed April 22, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. ——.

EX PARTE THOMAS J. CUDDY, APPELLANT.

No. ——.

EX PARTE ALYANDRO SAVIN, APPELLANT.

MOTION TO ADVANCE.

In the two above-entitled causes appellants respectfully move the Court that the said two causes be advanced, and that they be heard at this term of the Court as soon as shall be convenient to the Court; and for grounds of the motion state that both cases are appeals from final judgments of the circuit court of the United States for the district of Southern California, denying them writs of *habeas corpus* and dismissing their petitions. That they are both imprisoned in the county jail of Los Angeles county, California, under color of the authority of the United States, and, as they are advised, contrary to the laws and Constitution of the United States. That Cuddy's imprisonment is for six months from the 13th of February, 1889, and Savin's imprisonment is for twelve months from the 29th of February, 1889. That the facts in the two cases are similar, and the errors and points of law are the same, and that the cases can be heard together. And they respectfully pray the Court for a speedy hearing, in order that they may be delivered from their unjust imprisonment, as they are advised and conceive it to be.

J. A. ANDERSON,
Attorney for Appellants.

Office Supreme Court U. S.
FILED,
APR 25 1889
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

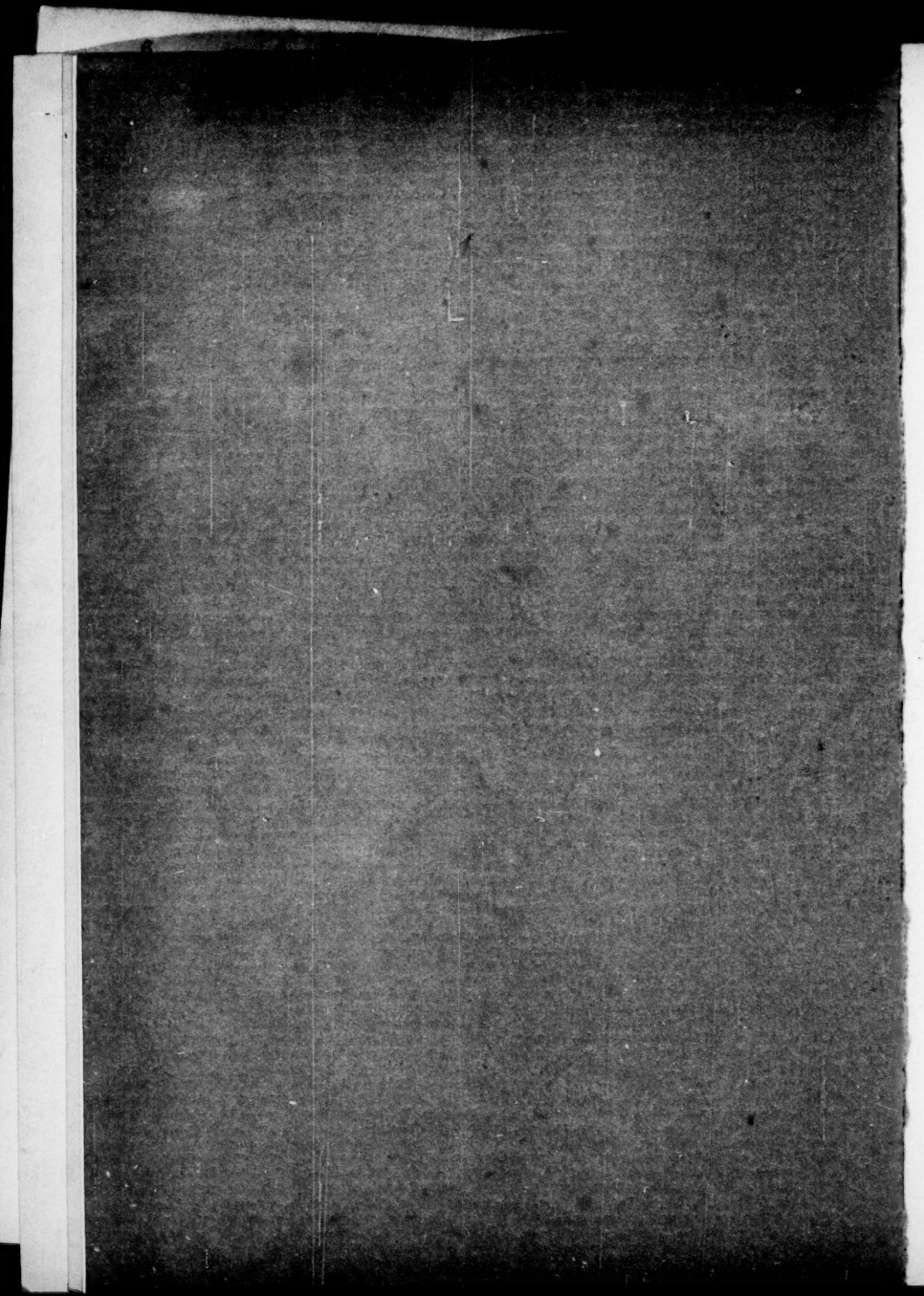
OCTOBER TERM, 1888.

IN THE MATTER OF THOS. J. CUDDY, No.

IN THE MATTER OF ALEJANDRO SAVIN, No.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NINTH CIRCUIT, SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1888.

IN THE MATTER OF THOS. J. CUDDY, NO.

IN THE MATTER OF ALEJANDRO SAVIN, NO.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NINTH CIRCUIT, SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASES.

THE CUDDY CASE.

During the progress of the trial of a criminal case, entitled *The United States* v. *W. More Young*, in the district court of the United States for the southern district of California, a term trial juror, in his examination on *voir dire*, swore that appellant had on the previous day sought to influence him to bring in a verdict of not guilty

in said case. Testimony on that point having been fully taken in open court, the trial judge issued a rule upon the said Cuddy, ordering him to show cause the following day why he should not be punished for contempt. The following day, appellant being present in court with counsel, testimony against and for appellant was taken. Appellant took the witness-stand in his own behalf; was examined by his counsel and cross-examined by the Government attorney, and, upon a full hearing the court found that appellant had corruptly sought to influence a juror in the discharge of his duty; thereupon adjudged him guilty of contempt of court and sentenced him to imprisonment for six months in the county jail of Los Angeles County.

Application was made for a writ of habeas corpus before the circuit court for the ninth circuit, southern district of California, and the application was refused. From the order and final decision of that court, denying the application, appellant brings this appeal.

THE SAVIN CASE.

The case of *The United States* vs. *H. Goujon* was being tried in the district court of the United States for the southern district of California; the witnesses on each side, after being all sworn, were excluded from the court-room until needed for their testimony. One Alejandro Savin, appellant here, unlawfully attempted and endeavored to deter a witness for the Government from testifying for the Government, and did unlawfully offer said witness money not to testify against the said Goujon. The matter was reported verbally to the judge presiding, who or-

dered that testimony be taken in the afternoon of the same day. At the time named the witness sought to be bribed was duly sworn in open court, the appellant then and there being present, and the testimony so given was taken down in short-hand. Upon that testimony a citation was issued ordering Savin to show cause the next morning why he should not be punished for contempt. A hearing was had at the appointed time. Defendant was present in court with counsel. Witnesses were examined by the Government attorney and cross-examined by appellant's attorney, and appellant testified fully in his own behalf. The court thereupon found that appellant had unlawfully attempted to deter the witness from testifying on behalf of the Government, and had unlawfully offered said witness money not to testify against the defendant in the case above named, and adjudged him guilty of contempt, sentencing him to twelve months' imprisonment in the county jail of Los Angeles County. The same steps were taken in this as in the first case, with the same results.

GROUNDS OF APPEAL.

Appellant seeks relief on two grounds:

FIRST. That the acts committed by him, as found by the judge of the district court, do not constitute contempt of court under § 725 of the Revised Statutes.

SECOND. That the proceedings upon which the judgment in contempt was founded were insufficient to put the power of the court in motion, and hence it acted without jurisdiction.

ARGUMENT.

The act of March, 1831, 4 Stat., 487, is divided into two sections, the first of which is now § 725, Revised Statutes, which reads as follows:

> The said (United States) courts shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice. * * *

The second, somewhat modified, §§ 5399 and 5404, R. S., which read as follows:

> Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness or officer in any court of the United States in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished, etc.

Appellant's contention is that any of the acts defined in the second section *must* be prosecuted by indictment and can not be punished summarily as a contempt.

As we read the act, the second section simply provides a possible additional punishment to that inflicted summarily for contempt.

THE ACT OF 1831.

In support of our position we call the attention of the court to the unusual language of that section. It reads:

> That if any person or persons shall corruptly or by threats or force endeavor to influence, intimidate,

> or impede any juror, witness, or officer in any of the courts of the United States, in the discharge of his duty, or shall corruptly, or by threats or by force, obstruct or endeavor to obstruct or impede the due administration of justice therein, every person or persons so offending *shall be liable to prosecution* therefor by indictment, and shall, on conviction thereof, be punished, etc.

In no other penal statute are the words in italics found. The import of and natural deduction from them is that of a *permissive* prosecution. Elsewhere the language of the law is mandatory, as: "shall, on conviction thereof, be punished," etc.

The title of the act itself is "An act declaratory of the law concerning contempts of court."

Again: If Congress intended the acts set out in the second section to be withdrawn from those punishable summarily as contempts under the general authority given to the Federal courts in the first section, why should the obstructing of the administration of justice be inhibited by both sections?

If prisoner's position be tenable, section 725, Revised Statutes, becomes absolutely inoperative; for under the second section of the act of 1831 any one who corruptly obstructs the administration of justice is to be prosecuted by indictment only, and no matter how serious or how flagrant his misbehavior, the judge can not punish him as for contempt, for the reason that such offense must be prosecuted by indictment.

To follow this remarkable theory of the Federal statute concerning contempt of court leads to the astonishing con-

clusion that a section of the Revised Statutes has no meaning and is of no force.

Section 725, Revised Statutes, makes the misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice, a contempt of court, and to be punished summarily.

Section 5404, Revised Statutes, makes the corrupt obstructing or impeding of the administration of justice an offense against the laws of the United States, and punishable as such.

OBSTRUCTING ADMINISTRATION OF JUSTICE.

Where the acts alleged are committed out of the presence of the court, the test whether they constitute contempt or not is: Does the misbehavior complained of obstruct the administration of justice?

In the instant case the facts are that appellant corruptly attempted to influence a term trial juror, a part of the court—sought to have him bring in a verdict of not guilty in a criminal case about to be called for trial.

If this is not misbehavior which obstructs the administration of justice, it is difficult to conceive what would do so.

> Wherever the conduct complained of ceases to be general in its effect and invades the domain of the court to become specific in its injury—to intimidate or attempt to intimidate with threats or otherwise * * * * witnesses or jurors, while in the discharge of their duties as such; if it be constructive because of the place where it happens, because of the direct injury it does in obstructing the workings of the organization for the administration of justice in

> that particular case, the power to punish it has not yet been taken away by any statute however broad its terms may apparently be. (United States *vs.* Anonymous, 21 Fed. Rep., 765.)

Interference with grand jury, it being a constituent part of the court, held to be contempt. (Harwell *vs.* State, 10 Lea [Tenn.], 548.)

Endeavoring to induce the sheriff to summon certain persons on a special panel held to be contempt of court.

> And this is so, although not within the court-house or in the immediate presence of the court. (*Sinnott* vs. *State*, 11 Lea [Tenn.], 282.)

To curse a witness in the piazza of the court-house is a contempt in the presence of the court (*United States* vs. *Carter*, 3 Cranch C. C., 423). And this, notwithstanding the act of 1831. (*United States* vs. *Anonymous*, *supra*.)

In the case of Sharon *vs.* Hill (24 Fed. Rep., 733), where the defendant committed an assault with a deadly weapon in the presence of a master in chancery, who was engaged in taking testimony by reference, the circuit judge held:

> The court of its own motion, the matter having been brought to its attention [by report of the master in chancery to the court] might well proceed, upon the acts as reported, as a gross contempt of court. * * * But these same acts which constitute a contempt in this case also constitute several offenses under the laws of the United States, punishable in the ordinary course of criminal proceedings. (*Sharon* vs. *Hill*, 24 Fed. Rep., 733.)

Holding intercourse with a juror held to be contempt. (*State* vs. *Doty*, 3 Vroom, 404.)

The court undoubtedly has power to punish for contempt any attempt to corruptly or unlawfully influence jurors, notwithstanding such party may likewise be indicted for the same offense. This power is necessary to enable the court to administer justice. (*Gandy* vs. *The State*, 13 Neb., 451.)

The contention of prisoner's counsel, that because the offense is an indictable one the court could not punish him as for contempt, but that punishment could only follow conviction after indictment, is untenable and against all the authorities.

(See Bishop on Criminal Law (Vol. II, Sec. 264; *Id.*, Vol. I, Sec. 1067); *Gandy* vs. *State* (13 Neb., 451); *Sharon* vs. *Hill* (24 Fed. Rep., 733); *In re Griffin* [N. C., 1887], (3 Southeastern Rep., 515); *Passmore Williamson Case* (26 Pa. St., 23); *In re Tyler* (64 Cal., 438); Rapalje on Contempts, p. 121, and cases cited.)

II.

PROCEDURE IN CONTEMPT.

The prisoner's second plea for liberty depends upon the proceedings by which he was brought into court and adjudged guilty of contempt. His contention is, that inasmuch as the offense was one not committed in the physical presence and hearing of the judge of the district court in which the trial of William More Young was pending, it was in consequence, if a contempt at all, one committed not *in facie curiæ*, and, hence, an affidavit setting out the alleged contempt must needs have been filed and served before the power of the court to punish could have been set in motion.

Recognizing the distinction made in the books between direct and constructive contempts and the numerous decisions requiring the filing and serving of an affidavit, it is, notwithstanding, respectfully submitted that contempt, within the meaning and intent of section 725, Revised Statutes, may be committed upon other branches of the court, and is not restricted to insult of the judge or such tumultuous behavior in his presence or hearing as would disturb him.

"The court" does not mean in the sense of section 725, Revised Statutes, merely the judge presiding and directing its conduct. The marshal, the clerk, witnesses under subpœna and sworn, jurors—all are constituent, legal, and necessary parts of the court as such.

Hence it is that in Harwell *vs.* State, in 10 Lea, 548, it was held that a grand jury was part of the court.

So interference with a sheriff held to be contempt in Sinnott *vs.* State, in 11 Lea, 282.

So also in United States *vs.* Carter, 3 Cranch, C. C., 423.

In the case at bar the person sought to be corrupted was a part of the court, a term trial juror, and acting as such, and the facts upon which the proceedings in contempt were based in the lower court were elicited under oath in open court and during the progress of the very trial in which a verdict was attempted to be obtained corruptly.

Admitting for the purposes of the argument that an affidavit should have been filed. What would be its purpose? Would it not be to acquaint the judge of the court contemned in some solemn manner with the facts upon which to predicate contempt proceedings? Has a written state-

ment of facts any greater solemnity or is it entitled to more weight than oral testimony adduced in open court and taken in short-hand by an official stenographer?

"An affidavit for an attachment against a defaulting witness, before a justice of the peace, need not be an oath in writing; the application for the attachment, as well as the oath, may be oral."

Baker *vs.* Williams, 12 Barb. (N. Y.), 527.

In Albany City Bank *vs.* Schermerhorn, 9 Paige (N. Y.), 372, it is said the proof may be either by affidavit or *other competent* and *satisfactory evidence.*

To same effect, Matter of Davies, 81 N. C., 72; State *vs.* Myers, 44 Iowa, 580; Rapalje on Contempts, page 122.

And it is suggested with extreme respect and some hesitation that in the Federal courts there is no rule of practice for punishment of contempt, committed constructively in the presence of the court, provided either by statute or by precedent. The only authority in the Federal jurisprudence against the statement just made is that found in 3 Blatchford, 148, *In re* Judson, where it is held: "When the contempt is not committed in *facie curiae* it must be proved by affidavits from persons who witnessed it."

Where contempt is committed in the presence of a master in chancery acting as such, the courts of the United States will proceed to act upon a report of the master unverified. (*Sharon* vs. *Hill*, 24 Fed. Rep., 733.)

In conclusion, it is maintained that in the instant case the judge of the court contemned became advised of the contempt committed, by the testimony in open court of one of its officers, which testimony fully revealed the contempt. The prisoner was accorded the fullest rights and

most complete defense; was represented by counsel, who cross-examined the witnesses produced at the hearing to establish the alleged contempt. The prisoner himself took the witness stand in his own defense. He has not before complained that he was not acquainted with the accusation against him, but, on the contrary, established his full knowledge of it by testifying in his own behalf, and it is submitted the order of Judge Ross should be affirmed.

GEORGE J. DENIS,
United States Attorney.
G. A. JENKS,
Solicitor-General.

IN THE

Supreme Court of the United States.

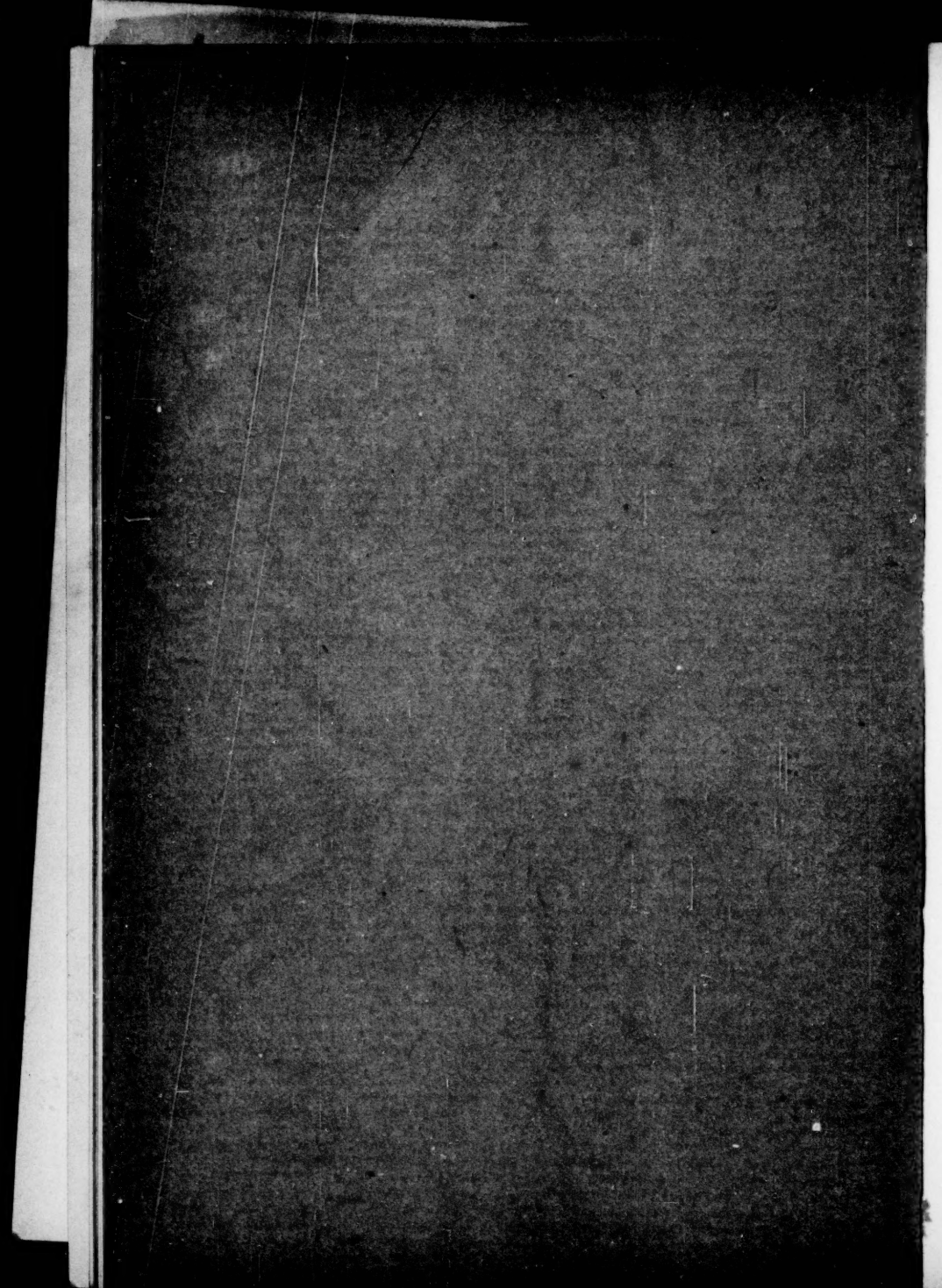
OCTOBER TERM, 1888.

In Re ALEJANDRO SAVIN, Ex Parte.

BRIEF OF ATTORNEY FOR ALEJANDRO SAVIN, APPELLANT.

L. A. Anderson
Attorney for Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.



In the Supreme Court of the United States.

IN RE ALEJANDRO SAVIN, EX PARTE.

Brief of Attorney for Alejandro Savin, Appellant.

STATEMENT OF FACTS.

Appellant, Savin, a citizen of Mexico, while in Los Angeles, California, was imprisoned in the jail of Los Angeles county, under a sentence of twelve months' imprisonment under a judgment of the district court for the southern district of California, rendered in a contempt proceeding.

He filed his petition in the United States Circuit Court of that district praying for a writ of *habeas corpus*, and stating that he was imprisoned under color of the authority of the United States contrary to the Constitution and laws of the United States. The petition sets out in full all of the contempt proceeding (as shown by the papers and record), and the judgment and the warrant of committal. The circuit court rendered final judgment, refusing the prayer of the petition, denying the writ and dismissing the petition. From that final judgment Savin prayed an appeal to this Court and the appeal was allowed.

The judgment of imprisonment was rendered under the following circumstances, as shown by the petition, to wit:

While the case of The United States *v.* Hippolyte Gou-

jon was on trial in the district court of the United States for the southern district of California, the district attorney stated to the court that he had been *informed* that one of the witnesses for the Government had been corruptly approached and sought to be intimidated from testifying in said case. Whereupon the court said it would hear testimony as to the matter and adjourned till 4 P. M.

The record recites that at 4 P. M. the defendant and respondent was present in court in custody of the marshal; that a stenographer was sworn to take down the proof, and one Dominguez was sworn to interpret the Spanish and English language; that the stenographer did take down the proof, and that upon the evidence thus taken down the court made the order of citation; that one Bartolo Flores was duly sworn as a witness, and testified for the Government, whereupon the court made the following order of citation, to wit: "Upon the evidence of Bar-
" tolo Flores in the above-entitled matter, it is ordered
" that Alejandro Savin show cause before this court at the
" court-room thereof at 9.30 o'clock to-morrow morning,
" Feb. 28, 1889, why he should not be adjudged guilty of
" contempt of this court, and the marshal of the court is
" directed to serve a copy of this order, together with a
" citation to be issued by the clerk, upon the said Ale-
" jandro Savin forthwith."

The record shows that the citation served upon Savin *merely* cited him to appear and show cause why he should not be adjudged guilty of contempt. The record further shows that next morning the defendant was present in court with his counsel. That counsel for Savin *demanded interrogatories*, and they were denied by the court. That thereupon several witnesses were sworn and testified for the Government, and that Savin was sworn and testified for himself. Final judgment was then entered reciting

that Flores was examined the day before and testified to the facts as found by the court; that the court thereupon made an order directing Savin to show cause before the court, next morning, why he should not be adjudged guilty of contempt; that next morning Savin appeared with his counsel, whereupon the said matter was heard in open court and witnesses for and against him were sworn and their testimony taken, and the judgment then recites as follows, to wit: "The court now finds the facts to be that "during the progress of the trial of an action of The "United States *v.* H. Goujon in this court on the 27th "day of February, 1889, one Bortolo Flores, a witness "on behalf of the Government duly subpœnaed and in "attendance upon the court, while in such attendance upon "the court on the 27th day of February, was on two sev-"eral occasions, once in the jury-room of the court, which "was temporarily used for a witness room, and which is "located within seven feet of the court-room, and once in "the hall-way of said court building, immediately adjoin-"ing the court-room, was approached by the respondent "Alejandro Savin, and the said Savin did then and there "in said jury-room unlawfully attempt and endeavor to "deter said witness Flores from testifying for the Govern-"ment in the aforesaid action, and in said hall-way the "said Savin did, at the time stated, unlawfully offer the "said witness Flores money not to testify against the de-"fendant therein, the aforesaid Goujon, from which facts "it is considered and adjudged by the court that the said "respondent, Alejandro Savin, did thereby commit a "contempt of court, for which contempt it is now or-"dered and adjudged that the said Alejandro Savin be im-"prisoned in the county jail of Los Angeles county, "California, for the period of one year. The marshal "shall execute this judgment forthwith. February 28, "1889."

The record shows that nothing was served on Savin except the order to show cause and the citation, and that neither the order nor the citation contained any statement of any of the matters constituting the alleged contempt.

Record further shows that Savin's attorney *demanded interrogatories*, and that they were denied by the Court, and that the proceedings were *purely oral*. The record further shows that witnesses were examined and that the judgment of contempt was based upon the testimony of the witnesses.

The errors we rely on for reversal are that the circuit court refused the prayer of the petition, denied the writs, and dismissed the petition; whereas the petition on its face shows:

I.

That the district court had no jurisdiction to *summarily punish* appellant for the matters and things set out in its judgment ordering his imprisonment.

II.

That the proceedings upon which the judgment of contempt was based were not in due course of law, and were not of a character upon which a valid judgment could be based, because--

1*st*. No written specifications of the facts constituting the contempt were furnished Savin (but when demanded were denied) so as to give him the opportunity of purging himself of the contempt.

2*d*. The judgment of the court is based upon the testimony of witnesses, whereas the only valid judgment the court could render in a case of criminal constructive contempt is one based upon the answer of the defendant--

either dismissing the proceeding or punishing the defendant, according as his answer either denied or confessed the alleged contempt.

3*d*. Even if it were *lawful* to have a trial and take testimony in this class of cases, yet it could only have been done upon an issue formed upon a specific charge in writing and an answer denying it; whereas in this case the proceedings were *purely oral*.

ARGUMENT.

The only jurisdiction that the district and circuit courts of the United States have to punish summarily for contempt of court is derived from and limited by the act of Congress approved March 2, 1831 (now section 725 and section 5399 of the Revised Statutes of the United States).

That act is found in vol. 4, United States Statutes-at-Large, pages 487–8, and is in the words and figures following:

CHAP. XCIX.—An act declaratory of the law concerning contempts of court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

SEC. 2. *And be it further enacted*, That if any person or persons shall, corruptly, or by threats or force, endeavor

to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall corruptly or by threats or force obstruct or impede, or endeavor to obstruct or impede the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offense.

Approved March 2, 1831.

We call the Court's attention to the *imperative* language of the statute, as follows, to wit:

"The power of the several courts of the United States "to issue attachment and inflict summary punishment for "contempt of court *shall not be construed to extend to any* "*cases except*," &c.

The act then proceeds to state the *cases* of contempt that could be punished *summarily*, and then in the second section points out the *cases* that should be punished by indictment.

The obvious intent of this imperative limitation was to prevent the United States courts from following the example of the English courts in summarily punishing persons for contempt, in a vast variety of cases, which they held to be constructive contempts.

Congress obviously thought that all that was necessary for the prompt vindication of the dignity and authority of the court was to empower the court to punish summarily—

1. Misbehavior, causing a disturbance of which the judge holding the court was conscious and could perceive through his senses, in the immediate presence of the court, or so near thereto as to prevent the court from duly proceeding in the administration of justice.

2. Misbehavior of its officers in their official duties.

3. Disobedience to its orders, judgments, or processes.

Congress also obviously thought that all other cases which the English courts had been in the habit of *summarily* punishing as contempts might safely be relegated to the usual mode of punishing crimes.

Now, as the first section of the act deprived the court of the power to summarily punish a number of graver offenses in the nature of contempts, and that had theretofore been summarily punished as contempts, it became necessary to make them punishable by indictment, and hence the necessity for the second section of the act.

The second section therefore provides that persons shall be punished by indictment who shall corruptly interfere with any juror, witness, or officer in any court of the United States, in the discharge of his duty, or who shall corruptly or by threats or force obstruct or impede or endeavor to obstruct or impede the due course of justice therein—that is, *such acts*, even though they did not occur in the presence of the court, and though the court was not conscious of them at the time they occurred.

This Court in *ex parte* Robinson (19 Wallace, on page 511) very clearly summarizes and construes the 1st section of the act of March 2, 1831. The court says:

"As thus seen the power of these courts in the punish-
" ment of contempts *can only* be exercised to insure de-
" corum in their presence, to secure faithfulness on the
" part of their officers in their official transactions, and to
" enforce obedience to their lawful orders, judgments, and
" processes."

The supreme court of Tennessee, in construing a similar statute in Harwell *v.* State (10 Lea. Tenn. Reports, 547), says:

"It will be observed that the first specification of the " warrant is 'wilful misconduct in the presence of the " ' court, or so near thereto as to obstruct the administra- " ' tion of justice.'

"This is the exact language of sub-section 1 of section " 4106 of the Code, wherein contempts of court are defined. " Obviously, therefore, this specification is framed on sub- " section 1. But we think the purpose of this sub-section " was to subject any person to the penalties of contempt " who wilfully, by clamorous or violent language or by tur- " bulent conduct in the presence of the court or so near " thereto, has interrupted its proceedings, and thereby ob- " structed the administration of justice."

Now what is meant by in the presence or "face" of the court is well shown by the authorities.

Blackstone says: "If the contempt be committed in the " *face* of the court, the offender may be instantly appre- " hended and imprisoned, at the discretion of the judges, " *without any further proof or examination.* But in mat- " ters that arise at a distance and of which the *court can* " *not have so perfect* a *knowledge*, *unless* by the *confession* " of the *party* or the *testimony* of others." (4 Bl. Com., 286.)

This clearly shows that "in the face of the court" is equivalent to "of which the court takes cognizance of by " its own senses."

In Bacon's Abridgment, Title Courts, E., this language is used:

"All such as shall be guilty of contempt in the face of " the court, as by giving opprobrious language to the " judge, or obstinately refusing to do their duty as officers " of the court," and says such acts shall be *instantly* pun- ished.

We further refer to the definitions of "in the face of the

court" given in many of the authorities quoted by us in our discussion of the second point of error hereinafter.

The district court evidently laid stress on the fact that the alleged attempt to interfere with the witness occurred in the court-building, and very near the court-room, while the court was in session.

We conceive that the words of the statute, "so near "thereto as to obstruct the administration of justice," clearly refers to matters of such a nature that the question as to whether they would disturb the court or not would depend upon their nearness or remoteness, and not to matters which, though they may occur in a few feet of the court, would no more affect it than if they had occurred a mile off.

Now in this case the court was not conscious of it, and was not aware of what had taken place until after it had happened, and then was INFORMED BY the *district* attorney that he *had been informed* of it.

To bring this case within the statute, it must be by *construction*, which the statute itself positively forbids.

SECOND GROUND OF ERROR.

Even if the court had had jurisdiction to summarily punish for the matters set out in the judgment, yet the judgment is clearly void, on account of the absolute departure by the court, in the proceedings upon which its judgment was based, from the mode of procedure in *criminal contempt* cases (when the facts constituting the contempt were not witnessed by the court itself) established by the common-law courts from time immemorial.

This established mode of procedure has always been followed in England and in the States of this country, except where a different mode of procedure has been prescribed by statute.

This mode was to reduce the charge to writing of some kind (an affidavit, order to show cause, interrogatories, &c.), specifically designating and setting out the facts constituting the alleged contempt. Then to serve a copy on the defendant and give him the opportunity of answering the charge, and then if he fully and explicitly denies the charge under oath, to dismiss the proceedings, and not permit the answer to be contradicted by the testimony of others.

In this case no writing specifically setting out the facts constituting the alleged contempt was ever served upon the defendant. When he called for interrogatories they were denied him. The whole proceeding was oral, and the judgment was based on the testimony of witnesses contradicting the testimony of defendant denying the charge.

In considering the nature of proceedings leading to a judgment of contempt, the cases should be divided into two classes:

1st. Those cases in which *the facts* necessary to base the conviction on are known to the judge or judges by their senses of seeing, hearing, &c.

2d. Those cases in which the facts necessary to base the conviction on must be brought to the knowledge of the court by the testimony of witnesses.

In the first class of cases, from necessity and the very nature of things, the judge acts instantly on his own observation and knowledge and adjudges the party guilty of contempt, and the only writing, paper, or record entry consists of the judgment and warrant of committal.

In this class of cases this entire departure from the fundamental law of the land in relation to criminal proceedings is based alone on necessity, and should be carried not a step further than is necessary.

In the other class of cases, as a basis of the proceedings,

there must be some affidavit, record, interrogatories, or some writing stating and specifying the facts constituting the alleged contempt on which to base the order of arrest or attachment, and to which the defendant may demur, plead, or answer, and when he has answered, purging himself of contempt, no evidence contradicting it can be heard.

The United States Supreme Court *In re* Terry (128 U. S. Reports) very clearly shows the distinction between those two classes of cases in the following passage found on pages 306, 307, 308, 309, and 310:

"For upon the facts recited in the order of September " 3d, showing a clear case of contempt committed in the " face of the circuit court, which tended to destroy its " authority, and by violent methods to embarrass and ob- " struct its business, the petitioner was *not entitled*, of *ab- " solute right*, either to a regular trial of the question of " contempt, or to notice by rule of the court's intention " to proceed against him, or to opportunity to make formal " answer to the charges contained in the order of commit- " ment. It is undoubtedly a general rule in all actions, " whether prosecuted by private parties or by the govern- " ment, that is, in civil and criminal cases, that 'a sentence "' of a court pronounced against a party without hearing "' him, or giving him an opportunity to be heard, is not a "' judicial determination of his rights, and is not *entitled* "' to *respect* in another tribunal.' (Windsor *v.* McVeigh, " 93 U. S., 274, 277.)

"But there is another rule, of almost immemorial an- " tiquity, and universally acknowledged, which is equally " vital to personal liberty and to the preservation of " organized society, because upon its recognition and " enforcement depend the existence and authority of " the tribunals established to protect the rights of the " citizen, whether of life, liberty, or property, and " whether assailed by the illegal acts of the Government " or by the lawlessness or violence of individuals. It has " relation to the *class* of *contempts* which, being *committed*

" in the *face* of a *court*, imply a purpose to destroy or im-
" pair its authority, to obstruct the transaction of its busi-
" ness, or to insult or intimidate those charged with the
" duty of administering the law. Blackstone thus states
" the rule : ' If the contempt be committed in the face of
" ' the court, the offender may be instantly apprehended
" ' and imprisoned, at the discretion of the judges, with-
" ' out any further proof or examination. But in matters
" ' that arise at a distance and of which the court cannot
" ' have so perfect a knowledge, unless by the confession
" ' of the party or the testimony of others, if the judges,
" ' upon affidavit, see sufficient ground to suspect that a
" ' contempt has been committed, they either make a rule
" ' on the supected party to show cause why an attach-
" ' ment should not issue against him, or, in very flagrant
" ' instances of contempt, the attachment issues in the first
" ' instance, as it also does if no sufficient cause be shown
" ' to discharge, and thereupon the court confirms and
" ' makes absolute the original rule ' (4 Bl. Com. 286). In
" Bacon's Abridgment, title Courts, E, it is laid down
" that, ' every court of record, as incident to it, may enjoin
" ' the people to keep silence under a pain, and impose
" ' reasonable fines, not only on such as shall be convicted
" ' before them of any crime on a formal prosecution, but
" ' also on all such as shall be guilty of contempt in the
" ' face of the court, as by giving opprobrious language to
" ' the judge, or obstinately refusing to do their duty as
" ' officers of the court, and immediately order them
" ' into custody.' ' It is utterly impossible,' said Ab-
" bott, C.-J., in Rex *v.* Davidson (4 B. & Ald., 329, 333),
" ' that the law of the land can be properly administered
" ' if those who are charged with the duty of administer-
" ' ing it have not power to prevent instances of inde-
" ' corum from occurring in their own presence. That power
" ' has been vested in the judges, not for their personal
" ' protection but for that of the public. And a judge will
" ' depart from his bounden duty if he forbears to use it
" ' when occasions arise which call for its exercise.'

" To the same effect are adjudications by the courts of
" this country. In State *v.* Woodfin (5 Iredell's Law, 199),

" where a person was fined for a contempt committed in " the presence of the court, it was said: 'The power to " ' commit or fine for contempt is essential to the existence " ' of every court. Business cannot be conducted unless " ' the court can suppress *disturbances*, and the only means " ' of doing that is by *immediate punishment*.

" 'A *breach* of the *peace* in *facie curiæ* is a direct dis- " ' turbance and a *palpable contempt* of the authority of " ' the court. It is a case that does not admit of delay, " ' and the court would be without dignity that did not " ' punish it promptly and without trial. Necessarily there " ' can be no inquiry *de novo* in another court as to the " ' truth of the fact. There is no mode provided for con- " ' ducting such an inquiry. There is no prosecution, no " ' plea, nor issue upon which there can be a trial.' So in " Whitten *v.* State (36 Indiana, 311): 'When the contempt " ' is committed in the presence of the court, and the court " ' acts upon view and without trial and inflicts the pun- " ' ishment, there will be no charge, no plea, no issue, and " ' no trial; and the record that shows the punishment " ' will also show the offense, and the fact that the court " ' had found the party guilty of the contempt; on appeal " ' to this court, any fact found by the court below would " ' be taken as true, and every intendment would be made " ' in favor of the action of the court.' Again, in *ex parte* " Wright (65 Indiana, 504, 508), the court, after observing " that a direct contempt is an open insult in the face of " the court to the persons of the judges while presiding, " or a resistance to its powers in their presence, said: " ' For a direct contempt the offender may be punished " ' instantly by arrest and fine or imprisonment upon no " ' further proof or examination than what is known to " ' the judges by their senses of seeing, hearing,' etc. (4 " Stevens' Com. Bk. 6, c. 15; Tidd's Practice, 9th ed., " London, 1828, 479–80; *Ex parte* Hamilton & Smith, 51 " Alabama, 66, 68; People *v.* Turner, 1 California, 152, " 155)."

" It results from what has been said that it was compe- " tent for the circuit court, immediately upon the commis- " sion, in its presence, of the contempt recited in the order

" of September 3, to proceed upon its *own knowledge* of " the *facts* and punish the offender, without further proof " and without issue or trial in any form. It was not bound " to hear any explanation of his motives, if it was satis- " fied, and we must conclusively presume from the record " before us that it was satisfied, from what occurred *under* " *its own eye* and *within its hearing*, that the ends of justice " demanded immediate action, and that no explanation " could mitigate his offense or disprove the fact that he " had committed such contempt of its authority and dig- " nity as deserved instant punishment."

Again, on page 312, the Court says :

" ' If it was necessary that the judgment should be pre- " ' ceded by a trial and the facts found upon a judicial " ' hearing, as with the ordinary criminal cases, it would " ' be otherwise. But in this proceeding nothing of the " ' kind was required. The *judicial eye witnessed* the act, " ' and the *judicial mind comprehended* all the circum- " ' stances of aggravation, provocation, or mitigation, and " ' the fact being thus judicially established, it only re- " ' mained for the judicial arm to inflict proper punish- " ' ment.' "

In the case of *Ex parte* Wright (65 Indiana), the distinction between the two cases is well stated on page 505 (65 Ind.) Tthe court says :

" A contempt of court is either direct or constructive ; " or, as the latter was anciently called, consequential. A " direct contempt is an open insult, in the face of the court, " to the person of the judges while presiding, or a resist- " ance to its powers in their presence. A constructive " contempt is an act done not in the presence of the court, " but at a distance, which resists their authority, as dis- " obedience to process or an order of the court, such as " tends in its operation to obstruct, interrupt, prevent, or " embarrass the administration of justice.

"For a direct contempt the offender may be punished "instantly by arrest and fine or imprisonment upon no "further proof or examination than what is known to the "judges by *their senses of seeing, hearing, etc.*, but in ren- "dering the judgment and making up the record the "causes of such contempt should be stated.

"The *grounds* of a constructive contempt should be "stated by affidavit by the return of some officer, or in "some way made known to the court, *prima facie*, by "witnesses or otherwise, so that may be *made* a PART of "the RECORD; and this *should* be done *before* a *rule* or *writ* "is *granted against* the alleged offender." (4 Bl. Com., 283, 286, 288; Tidd Practice, 478, 482.)

These two classes of contempts are also distinguished one from the other by the terms "direct" and "construc- "tive" or "consequential."

In Whitten *v.* The State, (36 Indiana), on pages 212 and 213, the court defines "direct" and "constructive" or "consequential" as follows:

"The above section embraces both direct and constructive "contempts. The contempt is direct when committed be- "fore and in the presence of, or so near to the court as to "interrupt the proceedings of the court. The refusal of "a witness to testify, the insolence and insubordination of "an attorney or other officer of court, fighting, making a "noise or confusion in or so near to the court as to inter- "rupt the business of court, may be mentioned as some "of the acts that amount to a direct contempt of the court; "and such contempts are usually punished in a summary "manner, *without evidence*, but upon the *view* and *personal* "*knowledge* of the presiding judge.

"Contempts are constructive when they are committed "not in the presence of the court, and when they tend, by "*their operation*, to *interrupt, obstruct, embarrass*, or pre- "vent the due administration of justice. The refusal of a "witness or juror to obey the process of the court; the re- "fusal of a citizen, when lawfully called upon by an officer,

" to assist in executing a warrant or other lawful process ;
" the refusal of a person, against whom an officer has a
" warrant, to submit to an arrest, or the escape of such
" person after arrest ; the attempt on the part of third per-
" sons to prevent an arrest or to procure an escape ; any
" *attempt* to *bribe*, *intimidate*, or *otherwise influence* a *juror ;*
" any *attempt* to intimidate a person from instituting or
" defending any action ; to counsel, advice, or persuade a
" witness or juror not to attend court when lawfully sum-
" moned ; to *threaten*, *intimidate*, *persuade*, or *bribe*, or *offer*
" to *bribe any witness to testify* to *anything that is not true*,
" *or* to *suppress* or *withhold* the *truth ;* the forcible abduc-
" tion of a witness or party with the view or for the pur-
" pose of preventing such witness from testifying in any
" cause pending in any court, to prevent such party from
" prosecuting or defending any action pending in any
" court, may be mentioned as some of the cases of con-
" structive contempts."

Having, as we think, fully shown the distinction contended for, we will now proceed to show what is necessary in proceedings in all cases of contempt, where the judgment or order is not based on knowledge of the judge derived through his own senses.

In all other cases the authorities clearly show that certain formal proceedings should be followed in order to render the judgment valid. There are certain things to be done in order to give the court jurisdiction of the person of the alleged offender and to punish the offense. We will proceed to examine the authorities.

Whitten *v.* The State (36 Indiana), on page 213, the court says :

" The proceeding against a party for a constructive con-
" tempt *must* be commenced by either a *rule* to *show cause*,
" or by an attachment. And such rule *should not* be *made*
" or attachment issue unless upon *affidavit specifically*
" making the *charge*."

In *Ex parte* Wright (65 Ind.), on pages 509 and 510, the court says:

"And before an attachment should issue upon a constructive contempt, all the facts which constitute the contempt must be made to appear *prima facie* to the court by affidavit, or the official return of some officer, or by other legitimate evidence in a way that they can be made a *part* of the *record*, and then unless the case is flagrant, and will not admit of delay, a rule *nisi* should first be granted against the alleged offender, and an opportunity afforded him to defend himself from the charge; but when the case is urgent, and delay dangerous to the interests of the injured party, upon case made, then the writ may go without first granting a rule *nisi*. In *no case*, however, of a constructive contempt, should either the rule or the writ go until the facts are put upon *record* in some way that they can be *demurred to*, *moved against*, or *controverted* by *evidence*. The judge cannot in a constructive contempt, from facts remaining in his own mind, exercise the judicial discretion resting in his breast, and grant either a rule *nisi* or the writ of attachment. Such hidden facts cannot be put upon record, nor pleaded to, nor controverted in any method known to judicial proceedings."

In Repalje on Contempts, on pages 121 and 122, it is said:

"Where the contempt is committed in *facie curiæ*, punishment is summary and generally immediate. No affidavit, process or interrogatories are necessary.

"The court takes *judicial notice* of *such contempts*, and therefore the sole purpose and object of an affidavit being to inform the court of the commission of the contempt, it would be superfluous to present one. * * *

"But the most common and, in the United States, the most universal practice in this matter is to present to the court an affidavit, setting forth the facts and circumstances constituting the alleged contempt, sworn to by the

" aggrieved party or some other person who witnessed the " offence. Unless such affidavit be presented, process " will not be granted. * * *

" If the affidavit is defective in substance, *i. e.*, fails to " allege facts which, if true, will constitute contempt in " law, the court will not acquire jurisdiction, and if it " proceeds, its judgment will be reversed on appeal or " error. All the *facts necessary* to *constitute* the con- " tempt should be *stated* in the *affidavit*."

We cite the following authorities to show that the defendant should be allowed to answer under oath, and that after he has fully and explicitly denied the facts constituting the charge specifically made against him that he should be discharged, and no evidence be allowed to contradict him.

We first call the Court's attention to the case of Burke *v.* The State (57 Indiana Reports). In it the authorities are most industriously produced, and the judge delivering the opinion takes occasion to correct language that he had inadvertently used in Whittier *v.* The State (36 Indiana, page 196) to the contrary.

In that case, on pages 530, 531, 532, 533, and 534, the court says:

" Mr. Blackstone says: 'If the party can clear himself " 'upon oath, he is discharged, but if perjured, may be " 'prosecuted for perjury.' In speaking of attachment as " a means of enforcing a private remedy in chancery, he " says: 'And *there*, after the party has answered the in- " 'terrogatories, such his answer may be contradicted and " 'disproved by affidavits of the adverse party; *whereas* " 'in the *courts* of *law* the admission of the party to purge " 'himself by oath is more favorable to *his liberty*, though, " 'perhaps not less dangerous to his conscience; for, if he " 'clears *himself* by his *answers*, the complaint is *totally* " '*dismissed*.'

" In the case in 6 Modern, 73, it was said by Holt, C. J.:

" ' When one is put to answer interrogatories for a fact
" ' fully proved against him, he ought to answer in cus-
" ' tody; but where it is anything doubtful, the course is
" ' to put him to answer—that is, to bind him by recogni-
" ' zance to answer. And in *either case*, if they *purge them-*
" ' *selves upon oath*, they are discharged, but they may be
" ' prosecuted for perjury if they swear false.'

" To the same effect is the case in 1 Yeates. In the case
" in 2 Gallison, which was for a contempt in forcibly res-
" cuing a prisoner, the court said:

" ' We cannot receive any collateral evidence as to the
" ' offense, but if the respondent, by his *affidavit* and *an-*
" ' *swer*, on *oath* to *interrogatories proposed by the district*
" ' *attorney*, discharges himself of the contempt, no *further*
" ' *proceedings can be had against him on the attachment.*
" ' If from any collateral evidence it should appear that
" ' there is reason to believe the respondent has perjured
" ' himself, we will recognize him to answer at the next
" ' term of the court to such matters as may be found
" ' against him.'

" In a note to this case, the following authorities are
" cited as bearing on the subject: Vin. Abr. Contempts,
" A. B.; Prac. Reg., 99, 100; Gilb. Com. Pleas, 20, 21;
" 12 Mod., 511; Mod. Cas., 73; Com. Dig. Chancery D.,
" 3; Salk, 321; 4 Bl. Com., 283; Rex *v.* Horsley, 5 T. R.,
" 362; 3 Hawk P. C., B. 2, ch. 22, secs. i, 32, 33, 34; I.
" W. Bl., 640; Wyatt's Reg., 138; 2 Burr R., 796; 2 Doug.,
" 516; Bac. Abr. Attachment, B.

" In the King *v.* Sims, above cited, 12 Mod., this is the
" opinion: ' Per Curiam—If one brought in in contempt
" ' deny all upon oath, he is, of *course*, *discharged* of the
" ' contempt; but if he has forsworn himself, he may be
" ' prosecuted for perjury.'

" In The King *v.* Vaughan (2 Doug., 516), above men-
" tioned, the report says:

" ' Lord Mansfield stated the practice of the court to be
" ' that if the defendant, by his affidavit, fully denies the
" ' charge on which the rule for an attachment was granted,
" ' that is sufficient; the *weight* of the *evidence*, or the
" ' *credibility* of what is *sworn*, is *never considered;* but if

" amination of the authorities that he was led into error
" by supposing that the rule in chancery was applicable to
" cases of criminal contempt.

" In our opinion the sworn statement of the defendant
" in this case was a full answer to the accusation made
" against him in the affidavit, and hence the court should
" have discharged the rule made against him and should
" not have proceeded to *hear evidence* in *support* of the
" *original affidavit* and in contradiction of the answer of
" the defendant.

" The judgment is reversed and the cause remanded,
" with *instructions* to *discharge* the *rule against* the *de-*
" *fendant.*"

In case of the matter of John Pitman (1 Curtis, page 186), opinion by Judge Curtis (Associate Justice of U. S. Supreme Court), on pages 189 and 190, the Court says :

" This jurisdiction is expressly saved to the courts of
" the United States by the act of Congress of March 5,
" 1831 (4 Stat.-at-Large, 487), which provides that the
" power of the several courts of the United States to issue
" attachments and inflict summary punishments for con-
" tempts of court shall not be construed to extend to any
" cases except (among others) the misbehavior of any of
" the officers of the said courts in their official transactions.
" It is in the nature of a criminal proceeding, and though
" often resorted to for protection and enforcement of
" private rights, such as the payment of money improperly
" withheld from suitors by officers of the court, and the
" like, and though its modes of proceeding may be *some-*
" *what varied* when the object is to afford a summary
" remedy for the violation of a private right, yet the
" character of the proceeding should not be lost sight of,
" and especially it should not be *so varied* as to *deprive*
" the *party proceeded against* of any *substantial right.*

" Now *one* of the most *important privileges* accorded by
" the law to one proceeded against, as for contempt, is the
" *right* to *purge himself, if he can, by his own oath.* So
" *rigid is the common law as to this that it does not allow*

" the *sworn answers* of the respondent to be controverted, " as to matter of fact, by any other evidence. (United " States *v.* Dodge, 2 Gall., 313.) 'If the party can clear " 'himself upon oath he is discharged.' (4 Bl. Com., 286, " 287.")

In 2 Flippin, *in re* May, on page 569, the court says :

" It is a cardinal rule in proceedings for contempt that " the answer of the respondent cannot be traversed and " must be taken as true. If false, the Government is re- " mitted to a prosecution for perjury." (4 Bl. Com., 287 ; In the Matter of Pitman, 1 Curtis, 186 ; United States *v.* Dodge, 2 Gall., 313.)

The absence of a written statement of the facts constituting the alleged contempt to which the defendant could answer renders the judgment void, and we cite the following authorities :

In Repalje on Contempts, page 126, it is said :

" It is well settled that a person charged with contempt " is entitled to notice in order to afford him an opportunity " to prepare his defense, and that a conviction founded " upon a proceeding without notice is void."

Again, on page 172, it is said :

" While strictly formal pleading is not essential in pro- " ceedings for contempt, such proceedings being summary, " yet it has been held that an attachment for a criminal " contempt should be drawn up with the particularity as " is required in an indictment.

" And where the attachment did not sufficiently apprise " the defendants of the facts constituting the alleged con- " tempt, they were discharged on *habeas corpus*."

In *Ex parte* Kilgore (3 Texas Court of Appeals), on pages 253 and 254, the court says :

"In the case of *Ex parte* Ireland, our supreme court "said:

"'We believe it to be the true practice, when a person is "'charged with a contempt of court, that before any final "'punishment should be assessed against him a citation "'should issue against him and calling on him to show "'cause why he should not be punished for the alleged "'contempt. This rule, however, should not interfere "'with the right of the court to order the arrest or fine "'of persons for misbehavior, by act or word in the "'presence of the court, or so near thereto as to inter-"'fere with or obstruct the administration of justice.' (38 "Texas, 351.)

"Again:

"An order of rule *nisi* of a court inflicting a punish-"ment for a contempt should state the facts on which it "is founded.

"*Ex parte* Field, 1 Cal., 187.

"*Ex parte* Rowe, 7 Cal., 181.

"In the case at bar, the court should in the first in-"stance have entered a rule *nisi* against the relators, which "in addition to what was stated as the cause of the sup-"posed contempt should have further declared wherein "and how the relators were disobeying, ignoring, and dis-"regarding the writ of *certiorari* and *scire facias*, issued "by the rule *nisi*, *should either have copied* the *rule* in "*hæc verba*, or have been full enough to put the parties "upon specific notice of the supposed contempt and "what charge it was necessary for them to answer."

In that case the defendant was discharged on *habeas corpus*.

In Langdon *Ex parte* (25 Vermont), the defendant was discharged on *habeas corpus* for defect in the proceedings, and on pages 682 and 683 the court says:

"And in convictions for contempt, which are always a "summary and arbitrary and offensive jurisdiction (unless "the contempt be committed in view of the court or mag-

" istrate), the party accused is to have an opportunity to " be heard, before he is adjudged finally guilty of the con- " tempt and punished."

The proceedings in this case come clearly within the rule stated. In Windsor *v.* McVeigh (3 Otto, on page 284) the Court says:

" So a departure from *established modes* of procedure " will often render the judgment void; thus, the sentence " of a person charged with felony, upon conviction of the " court without the intervention of a jury, would be invalid " for any purpose. The decree of a court of equity, upon " oral allegations without written pleadings, would be an " idle act of no force beyond that of an advisory proceed- " ing of the chancellor.

" And the reason is that the courts are not authorized " to exert their power in that way."

In this case Savin has been sentenced to *twelve months'* imprisonment (just four times the length of imprisonment prescribed for the same offense by the 2d section of act of March, 1831), on a purely oral trial, and without an opportunity to be heard; that is, in *sense* of the *common law*, which always, when speaking of an *opportunity* to be *heard*, *means* an *opportunity* to *reply* to the *charge specifically stated* in *some written form served upon him.*

The only departure in legal proceedings from this *common-law* opportunity to be heard is the one stated above, to wit, when the contempt is *witnessed* by the court itself.

J. N. Anderson

Attorney for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

In Re THOMAS J. CUDDY, Ex Parte.

BRIEF FOR APPELLANT.

L. S. Anderson

Attorney for Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1889.

IN THE

Supreme Court of the United States.

IN RE THOMAS J. CUDDY, EX PARTE.

BRIEF FOR APPELLANT.

This case arose on petition for *habeas corpus* presented to the circuit court of the United States for the district of Southern California. The circuit court entered final judgment denying the writ and dismissing the petition. From this final judgment the petitioner prayed an appeal to this Court, and the appeal was allowed. Petitioner alleges in his petition that he is imprisoned in the jail of Los Angeles county, under color of authority of the United States and contrary to the Constitution and laws of the United States. That he is imprisoned under a pretended judgment of the United States district court for the Southern District of California. The petition shows that the said judgment was rendered under the following circumstances:

The case of The United States *v.* W. More Young had been called for trial in said district court on the 12th of February, 1889, and while the jury were being impanelled, one of the jurors summoned, whilst being examined as to his qualifications as a juror by the United States district attorney, stated that he had been approached and spoken to in reference to this case, on the day before, by Thomas J. Cuddy. The juror upon further examination stated

that he had been approached by Thomas J. Cuddy, with the object, on Cuddy's part, to influence the said juror in the action then on trial before the court. Thereupon the court made an order that Cuddy appear before the court on the next day to show cause why he should not be punished for contempt, and ordered a citation to issue citing Cuddy to appear and show cause. The citation issued, and it was served upon Cuddy.

On next day Cuddy appeared in open court and excepted to the proceedings; a general denial was entered on his behalf; two witnesses on the part of the Government were sworn and testified. Cuddy's counsel then moved to dismiss the matter of contempt, and the motion was denied. Cuddy was then sworn and testified on his own behalf. That the court then entered judgment, reciting what had taken place the day before, as above set forth, and that Cuddy had been cited to appear to show cause why he should not be adjudged guilty of contempt, and that he appeared in response to the citation; that testimony was then introduced in respect to the matter for and against him; and that the court, having duly considered the testimony, find the facts to be that Cuddy did upon the 11th of February, 1889 (the day before the case of United States *v.* Young was called for trial), approach Robert McGarvin, at the time being a term trial juror, with a view to improperly influence the said McGarvin's action in the case of The United States *v.* Young, *in the event* the said McGarvin should be sworn as a juror in said action. The court then proceeded to adjudge Cuddy guilty of a contempt of court, and ordered his imprisonment for six months in the jail of Los Angeles county.

There is no pretence that Cuddy's connection with the juror occurred in the presence of the court, not even constructively. It was not even in the court building, and

there is nothing in the proceedings or judgment to show that the court was in session on the day that it occurred.

The record shows that nothing was served on Cuddy save the citation, and that was a mere notice to appear in court and show cause why he should not be punished for contempt, without stating or specifying any of the facts constituting the alleged contempt. And the whole proceedings upon which the judgment of contempt is based were purely oral. The record shows that Cuddy entered a general denial and moved to dismiss the proceedings, and that the motion was denied, and that the court proceeded to hear the testimony of witnesses, and based its judgment on this testimony, contradicting Cuddy's denial and testimony.

The grounds of error and points of law arising in this case are the same as those in the case of *In re* Alejandro Savin, and we beg leave respectfully to refer the Court to our brief in that case for the grounds of error, points of law and argument. The only difference in the facts is that the matter in the Savin case occurred in the court building while the court was in session, whereas the matter in the Cuddy case did not occur in the court building, or, so far as the record and judgment show, while the court was in session.

L. A. Anderson

Atty. for Appellant.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1553.

EX PARTE: IN THE MATTER OF ALEJANDRO SAVIN, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED APRIL 22, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 22, 1889.

1 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of the State of California.

In Re ALEJANDRO SAVIN.

Petition for Writ of Habeas Corpus.

To the honl. circuit court of the United States, 9th circuit, southern district of California:

Your petitioner, Alejandro Savin, complaining that he is unjustly and unlawfully detained and imprisoned by D. R. Risley, United States marshal for the southern district of California, and P. M. Darcy, warden of the jail of Los Angeles county, California, in the county jail, in the county of Los Angeles and State of California, by color of the authority of the United States, contrary to the Constitution and laws of the United States, to wit:

Under and by virtue of a warrant of commitment based upon a pretended judgment of the district court of the United States, ninth circuit, southern district of California, adjudging him guilty of contempt of court and sentencing him to twelve months' imprisonment in the county jail of Los Angeles county, California.

Your petitioner is a citizen of the Republic of Mexico and of the State of Lower California, and on the 27th day of February, 1889, was in the city of Los Angeles, and on the 27th and 28th of February, 1889, proceedings were had in said district court, resulting in said pretended judgment and the imprisonment of your petitioner thereunder.

The following are true copies of all minute entries and records and files of said court in said proceedings:

2 *Minute Entry.*

In the District Court of the United States of America for the Southern District of California.

Wednesday, February 27th, 1889; January term, A. D. 1889.

Court met pursuant to adjournment.
Present: Hon. E. M. Ross, district judge.

Geo. J. Denis, Esq., U. S. attorney, stated to the court that he had been informed that one of the witnesses for the Government in the case of the United States of America *vs.* Heppolyte Goujon had been corruptly approached and sought to be intimidated from testifying in said case, then and there pending in said court; whereupon the court stated that it would hear testimony in the matter at 4 o'clock p. m. of this day; to which hour a recess was taken.

4 o'clock P. M.

In the Matter of the Contempt of ALEJANDRO SAVIN.

Defendant and respondent present in court in custody of the marshal.

Geo. J. Denis, Esq., U. S. attorney, appearing for the Government.

On motion of the U. S. district attorney, G. W. Gibson sworn as stenographer, and said stenographer proceeded & did take down the testimony of the witness, and upon the testimony so taken down the court made the order of citation.

R. J. Dominguez duly sworn to interpret the Spanish and English languages. Bartolo Flores duly sworn as a witness and testified for the Government; whereupon the court directs the following order to be entered:

3 Upon the testimony of Bartolo Flores, given in the above-entitled matter, it is ordered that Alejandro Savin show cause before this court, at the court-room thereof, at 9.30 o'clock to-morrow morning, Feb. 28th, 1889, why he should not be adjudged guilty of a contempt of this court, and the marshal of the district is directed to serve a copy of this order, together with a citation, to be issued by the clerk, upon the said Alejandro Savin forthwith:

Minute Entry.

In the District Court of the United States of America for the Southern District of California.

Thursday, Feb. 28th, 1889; January term, A. D. 1889.

Court met pursuant to adjournment.

Present: Hon. E. M. Ross, district judge.

In the Matter of the Contempt of ALEJANDRO SAVIN.

Defendant and respondent present in court, accompanied by his counsel, C. E. J. Munday; Geo. J. Denis, Esq., U. S. attorney,
4 appearing for the Government.

This matter coming on regularly for hearing, counsel for defence asks and demands of the prosecution service of interrogatories, which demand is denied by the court and excepted to; thereupon A. E. Sepulveda was duly sworn to interpret the Spanish and English languages; also R. J. Dominguez. Bartolo Flores is duly sworn, and testifies as a witness for the Government; R. O. Snedegar, W. A. Citerly, Chas. W. Mansir, and R. A. Dominguez duly sworn and examined as witnesses for the Government.

Alejandro Savin, the respondent, is duly sworn and testifies in his own behalf. There being no further testimony, the matter is submitted; and all the testimony having been taken down by the short-hand reporter, and upon the testimony so taken the court acted and directs the following order and judgment:

In the United States District Court for the Southern District of California.

In Re ALEJANDRO SAVIN.

Whereas during the progress of the trial of the action of the United States of America *v.* H. Goujon, in this court, on the 27th day of Feb., 1889, one Bartolo Flores, a witness on the part of the Government, duly subpœnaed and in attendance upon the court, testified, in substance, that while in said attendance, on said 27th day of February, one Alejandro Savin, on two several occasions, once in the jury-room of said court, temporarily used for witnesses, and within a few feet of the court-room, and once in the hallway of said court building, immediately adjoining said court-room, did approach said witness and in said jury-room did improperly endeavor to deter the said witness from testifying in behalf of the Government in said cause, and in the said hallway he offered the said witness money not to testify against the defendant in said action
5 of the United States *v.* Goujon; and whereas upon such testimony of said Flores this court then and there made an order directing the said Savin to show cause before this court, at 9.30 o'clock a. m., on the 28th day of Feb., 1889, at the court-room thereof, why he should not be adjudged guilty of a contempt of this court; and whereas, on said 28th day of February, the said Savin appeared with counsel in response to said order; whereupon the said matter was heard in open court, and witnesses for and against him were sworn, and their testimony given, and the same having been duly considered by the court, the court now finds the facts to be—

That during the progress of the trial of the action of the United States of America *v.* H. Gougon, in this court, on the 27th day of February, 1889, one Bartolo Flores, a witness on behalf of the Government, duly subpœnaed and in attendance upon the court, while in such attendance, on the said 27th day of February, was on two several occasions, once in the jury-room of said court, which was temporarily used for a witness-room and which is located within less than 7 feet of the court-room, and once in the hallway of said court building, immediately adjoining the court-room, was approached by the respondent, Alejandro Savin, and said Savin did then and there, in said jury-room, unlawfully attempt and endeavor to deter said witness, Flores, from testifying for the Government in the aforesaid action, and in said hallway the said Savin did at the time stated unlawfully offer the said witness, Flores, money not to testify against the defendant therein, the aforesaid Goujon; from which facts it is considered and adjudged by the court that the said respondent, Alejandro Savin, did thereby commit a contempt of this court, for which contempt it is by the court now ordered and adjudged that the said Alejandro Savin be imprisoned in the county jail
6 of Los Angeles county, California, for the period of one year.

The marshal will execute this judgment forthwith.

February 28th, 1889.

ROSS,
District Judge.

The following is a true copy of the citation issued in said matter and served upon the petitioner on Feb. 27, 1889, by D. R. Risley, U. S. marshal:

United States District Court, Southern District of California.

The President of the United States to the marshal of the United States for the southern district of California, Greeting:

Whereas an order has been this day entered by this court that Alejandro Savin be cited and admonished to appear and show cause why they [he] should not be fined for contempt: Now, therefore, this is to command you that you cite and admonish the said Alejandro Savin, if he be found within your district, to be and appear before the Honorable Erskine M. Ross, judge of the United States district court for the southern district of California, at the court-room. in the city of Los Angeles, on Thursday, the 28th day of February, 1889, at 9.30 o'clock a. m., that he may then and there show cause, if any he can, why he should not be adjudged guilty of contempt, and to do and receive what the said court shall order in the premises.

Seal of Dist. Court.

Witness the Hon. Erskine M. Ross, judge of said court, this 27th day of February, 1889, and of the Independence of the United States the one hundred and thirteenth.

E. H. OWEN, *Clerk*,
By —— ——,
Deputy Clerk.

The following is a true copy of the commitment issued in said matter, under which petitioner is imprisoned:

UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF CALIFORNIA, *ss*:

The President of the United States to the marshal of the United States for the southern district of California, Greeting:

Whereas, at the January term of the district court of the United States of America for the southern district of California, held at the court-room of said court, in the city and county of Los Angeles, in said district, to wit, on the 28th day of February, A. D. 1889, Alejandro Savin was convicted of a contempt of the said court, committed on the 27th day of February, 1889, at the city of Los Angeles, county of Los Angeles, State of California, and within the jurisdiction of said court, contrary to the form of the statutes of the United States in such case made and provided and against the peace and dignity of the said United States;

And whereas, on the 28th day of February, A. D. 1889, being a day in the said term of said court, said Alejandro Savin was, for said contempt, of which he stood convicted as aforesaid by the judgment of said court, ordered to be imprisoned in the county jail of Los Angeles county, California, for the period of one year from date of February 28th, 1889:

Now, this is to command you, the said marshal, to take and keep and safely deliver the said Alejandro Savin into the custody of the keeper or warden or other officer in charge of said county jail of Los Angeles county, California, forthwith.

And this is to command you, the said keeper and warden and other officers in charge of the said county jail aforesaid, to receive from the United States marshal of said southern district of California the said Alejandro Savin, convicted and sentenced as aforesaid, and him, the said Alejandro Savin, safely keep and imprison in the county jail of Los Angeles county, California, as aforesaid, for the period of one year from the date of February 28, 1889.

Herein fail not.

Witness the Hon. Erskine M. Ross, judge of the district court of the United States for the southern district of California, and the seal thereof, at Los Angeles, in said district, on the 28th day of February, A. D. 1889.

Seal of Dist. Court.

E. H. OWEN,
Clerk of said District Court.
By —— ——,
Deputy Clerk.

10 The foregoing is a full and complete statement of all the proceedings of said court, under which petitioner is imprisoned—

And your petitioner claims that said United States district court had no jurisdiction or authority legally to try and sentence him in the manner and form above stated.

1. For the reason that the matters set out in said judgment do not constitute any contempt of court provided for by section 725 of the Revised Statutes of the United States.

2. For the reason that the proceedings in said court were insufficient to give the court jurisdiction to proceed to judgment in said matter.

3. For the reason that said judgment is void, because not based or founded upon any proceedings in due course of law.

Wherefore your petitioner prays that this honorable court do forthwith order the writ of *habeas corpus* to issue from this court to the said D. R. Risley and P. M. Darcy, marshal and warden as aforesaid, requiring them to produce the body of your petitioner before this court at some time to be designated in said writ, then to abide what shall be awarded by this court.

ALEJANDRO SAVIN.

ANDERSON, FITZGERALD & ANDERSON,
Att'ys for Petitioner.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

Alejandro Savin makes oath and says that he is the petitioner in the foregoing petition and knows the contents thereof, and that the facts set forth in said petition are true.

ALEJANDRO SAVIN.

Sworn to and subscribed before me this 10th day of April, 1889.
[SEAL.] WM. M. VAN DYKE,
Clerk U. S. Circuit Court for the Southern District of California,
By E. H. OWEN, *Deputy.*

11 (Endorsed:) 122. Circuit court of the United States, ninth circuit, southern district of California. *In re* Alejandro Savin. Petition for *habeas corpus.* Filed April 10th, 1889. Wm. M. Van Dyke, clerk, by E. H. Owen, deputy. Anderson, Fitzgerald & Anderson, att'ys for petitioner.

12 *In Re* ALEJANDRO SAVIN.

Petition for Writ of Habeas Corpus.

Be it remembered that on this 11th day of April, 1889, Alejandro Savin, by his attorneys, Anderson, Fitzgerald & Anderson, presented in open court the petition for the writ of *habeas corpus* to D. R. Risley, marshal, and P. M. Darcy, warden of Los Angeles county jail, heretofore filed in this court; and the same being heard and considered by the court, it is ordered and adjudged that the prayer of said petitioner be refused and the writ prayed for denied, and that the said petition be dismissed, and that petitioner pay the costs of this proceeding.

ROSS,
District Judge.

13 United States Circuit Court, Ninth Circuit, Southern District of California.

In Re ALEJANDRO SAVIN, Petition for *Habeas Corpus.*

The above-named petitioner, conceiving himself aggrieved by the final judgment and decision entered on the 11th day of April, 1889, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that his appeal may be allowed, and that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the Supreme Court.

ANDERSON, FITZGERALD & ANDERSON,
Attorneys for Petitioner.

(Endorsed:) Filed Ap'l 11th, 1889. Wm. M. Van Dyke, clerk, by E. H. Owen, deputy.

14 *In Re* ALEJANDRO SAVIN.

Petition for Writ of Habeas Corpus.

In this cause, the petitioner having prayed an appeal to the Supreme Court of the United States from the final judgment, this day rendered in this cause, refusing the prayer of the petition and denying the writ prayed for and dismissing the petition, it is ordered and adjudged that the said appeal be allowed upon petitioner enter-

ing into a bond, with sufficient sureties, payable to the United States, in the sum of two hundred and fifty dollars, conditioned to prosecute his appeal with effect or else pay all costs that may accrue.

And it is further ordered that a transcript of the record, proceedings, and papers in this cause, duly authenticated, be sent to the Supreme Court of the United States.

ROSS,
District Judge.

15 UNITED STATES OF AMERICA,
Southern District of California:

Circuit Court.

Know all men by these presents that as [we], Alejandro Savin, as principal, and Albert Rimpau and J. W. Beecher, as sureties, are held and firmly bound unto the United States in the sum of two hundred and fifty dollars, to be paid by the said Alejandro Savin to the United States; to which payment, well and truly to be made, we do bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this 11th day of April, 1889.

Whereas, on the 11th day of April, 1889, the circuit court of the United States, ninth circuit, district of Southern California, in a proceeding in said court where the said Alejandro Savin filed his petition in said court praying for a writ of *habeas corpus* to D. R. Risley, marshal of said district, and to P. M. Darcy, warden of the jail of Los Angeles county, California, the said court entered a final judgment refusing the prayer of said petitioner and denying the said writ and dismissing the petition;

And the said Alejandro Savin having prayed and been allowed an appeal from said judgment to the Supreme Court of the United States, now sitting in Washington:

Now, the condition of this obligation is such that if the said Alejandro Savin shall prosecute his appeal to effect and answer all costs if he shall fail to make good his plea, then the above obligation to be void; otherwise to remain in full force and virtue.

ALBERT RIMPAU. [SEAL.]
J. W. BEECHER. [SEAL.]

16 UNITED STATES OF AMERICA, }
Southern District of California, } *ss:*

Albert Rimpau and J. W. Beecher, being duly sworn, depose and say and each for himself saith that he is worth two hundred and fifty dollars over and above all just debts, liabilities, and exemptions.

ALBERT RIMPAU.
J. W. BEECHER.

Sworn to and subscribed before me this 12th day of April, 1889.
[Seal of said Dist. Court.]

E. H. OWEN,
U. S. Commissioner and Clerk of the U. S. District Court, Southern District of California.

(Endorsed:) Filed April 12th, 1889. Wm. M. Van Dyke, clerk, by E. H. Owen, deputy.

The form of the foregoing bond and the sufficiency of the sureties thereto is hereby approved.

ROSS,
District Judge.

17 Circuit Court of the United States, Southern District of California.

In Re ALEJANDRO SAVIN, Petitioner for *Habeas Corpus.*

I, George J. Denis, hereby waive all notice of appeal in the above-entitled cause and all service upon me of citation to appear in the Supreme Court of the United States in the matter of said appeal.

GEORGE J. DENIS,
United States Attorney for Southern District of California.

18 In the Supreme Court of the United States.

In Re ALEJANDRO SAVIN, Petitioner for *Habeas Corpus.*

On appeal.

And now comes the appellant, by his attorneys, and says that in the records and proceedings aforesaid there is a manifest error—

1. That the circuit court erred in refusing the prayer of the petition and denying petitioner the writ of *habeas corpus*, as prayed for therein.

2. That the circuit court erred in dismissing petitioner's petition.

Wherefore this appellant prays that the said judgment of the circuit court, ninth circuit, district of Southern California aforesaid, may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by occasion of the said judgment, &c.

ANDERSON, FITZGERALD & ANDERSON,
Attorneys for Appellant.

19 UNITED STATES OF AMERICA, *Southern District of California,* } *ss:*

I, Wm. M. Van Dyke, clerk of the circuit court of the United States, ninth circuit, southern district of California, do hereby certify that the above and foregoing are true and correct copies of the petition, final judgment, the prayer for appeal, the order allowing appeal, the appeal bond and the judge's approval thereof, the waiver

of notice of appeal and of citation to appear by the United States district attorney, and the assignment of errors on said appeal to the Supreme Court of the United States in the cause No. 122, The United States *vs.* Alejandro Savin, petition for writ of *habeas corpus*, on file in my office.

Seal U. S. Circuit Court, Southern Dist. Cal. 1886.

Witness my hand and the seal of the said circuit court this 12th day of April, A. D. 1889.

WM. M. VAN DYKE, *Clerk*,
By E. H. OWEN, *Deputy Clerk*.

20 [Endorsed:] No. 122. In the U. S. circuit court of the United States, ninth circuit, southern district of California. The United States of America *vs.* Alejandro Savin. Transcript on appeal to the Supreme Court of the United States from order denying petition for writ of *habeas corpus*.

Endorsed on cover: S. California C. C. U. S. No. 1553. *Ex parte:* In the matter of Alejandro Savin, appellant. Filed April 22, 1889.